IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

RICHARD R. RUSH,

Plaintiff,

v.

DONNA E. SHALALA,
SECRETARY OF HEALTH AND
HUMAN SERVICES,

Defendant.

Case No: 94-C-153-W

JUDGMENT

Judgment is entered in favor of the Secretary of Health and Human Services in accordance with this court's Order filed June 30, 1995.

Dated this 7th day of July, 1995.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HAROLD R. THOMPSON; REBECCA THOMPSON; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

Civil Case No. 94-C 939E

ORDER CONFIRMING SALE

The Court has for consideration the Report and Recommendation of the United States Magistrate Judge filed May 17, 1995, in which the Magistrate Judge recommended that the Motion to Confirm Sale be granted. No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

After careful consideration of the record and the issues, the Court has concluded that the Report and Recommendation of the United States Magistrate Judge should be and is affirmed.

It is therefore **ORDERED** that the Motion to Confirm Sale is granted.

Dated this 7 day of July, 1995.

S/ JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

NOTE: THIS ORDER IS TO BE MAILED BY MOVANT TO ALL COUNSEL AND PRO SE LITIGANTS IMMEDIATELY UPON RECEIPT.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FABSCO, INC.,

Plaintiff,

v.

PRC TRADE, INC.,

Defendant.

Case No. 94-C-1060 K

DISMISSAL WITHOUT PREJUDICE

Plaintiff, Harsco, Inc., hereby dismisses this action without prejudice pursuant to Rule 41(a)(1)(i) of the Federal Rules of Civil Procedure.

Respectfully submitted,

James W. Rusher, OBA #11501
Heath E. Hardcastle, OBA #14247
ALBRIGHT & RUSHER
2600 Bank IV Center
15 West Sixth Street
Tulsa, Oklahoma 74119-5434
(918) 583-5800

ATTORNEYS FOR PLAINTIFF
HARSCO, INC.

CERTIFICATE OF MAILING

I, James W. Rusher, hereby certify that on the 7 day of July, 1995, I caused a true and correct copy of the above and foregoing instrument to be placed in the United States mails in Tulsa, Oklahoma, with proper postage fully prepaid thereon, addressed to:

Racheal Ju
CFO
PRC Trade, Inc.
P.O. Box 1324
Herndon, VA 22070

James W. Rusher

070695L3.JWR (2000.03)

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

DAVID M. LUKE,

Plaintiff,

v.

DONNA E. SHALALA,
SECRETARY OF HEALTH AND
HUMAN SERVICES,

Defendant.

Case No: 93-C-745-W

JUDGMENT

Judgment is entered in favor of the Secretary of Health and Human Services in accordance with this court's Order filed June 30, 1995.

Dated this 7th day of July, 1995.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

18

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DOMINO'S PIZZA, INC., a Michigan corporation,

Plaintiff,

vs.

EL-TAN, INC., an Oklahoma corporation; MICHAEL A. ELLIS, an individual; DANNY TAN SHEAU YANG, an individual; OWASSO PIZZA, INC., an Oklahoma corporation; and WAYNE SALISBURY, an individual,

Defendants.

Case No. 95-C-180-B

EOD 7/7/95

DOMINO'S PIZZA, INC. a Michigan corporation,

Plaintiff,

v.

ELVIEANNA LYNNE POTTS, an individual,

Defendant.

Case No. 95-C-182-BU

DOMINO'S PIZZA, INC. a Michigan corporation,

Plaintiff,

v.

B.A. ENTERPRISES, INC., an Oklahoma corporation; LEWIS WAYNE HUMBYRD, an individual; RONALD PREDL, an individual; and JERRY EVANS, an individual,

Defendants.

Case No. 95-C-181-B

29

JUDGMENT

Pursuant to the Agreed Findings of Fact and Conclusions of Law entered this date and the Court's consideration of the pleadings filed herein, **IT IS ORDERED, ADJUDGED, AND DECREED** as follows:

Domino's Pizza, Inc. have and recover judgment against El-Tan, Inc., B.A. Enterprises, Inc., Owasso Pizza, Inc., Elvieanna Lynne Potts, Michael A. Ellis, Danny Tan Sheau Yang, Wayne Salisbury, Lewis W. Humbyrd, Ronald Predl and Jerry Evans ("Defendants") in the form of a permanent injunction. Defendants, their agents, servants, employees and all persons acting by or under their authority, or in concert with them, are hereby permanently enjoined:

1. From participating in the pizza carry-out and/or delivery business at the sites of their former Domino's franchises, or within 10 miles thereof, for one year from April 28, 1995;

2. From refusing to assign any rights in the leases to the former Domino's sites to Domino's;

3. From refusing to turn over to Domino's any customer lists developed during operation of the franchises. Defendants may retain copies thereof, but may not employ them in a manner that violates the terms of this Permanent Injunction. In this regard, see the letter written to Defendants by Domino's dated May 9, 1994; and

4. From (a) using the Domino's telephone numbers or telephone numbers relating to, advertised with or associated with the Domino's Marks; (b) using all classified and other directory listings relating to the Domino's Marks; (c) refusing to notify the telephone company and all listing agencies of the termination of their right to use all telephone numbers and all classified and other directory listings relating to the Domino's Marks; (d) refusing to transfer by assignment all telephone numbers and all classified and other

directory listings relating to the Domino's Marks; and (e) displaying, either directly or indirectly, any Domino's Marks or any mark, word, symbol, trade dress or name similar to the Domino's Marks which is likely to cause confusion, mistake, or deception on signs, letters, literature, advertisements or other printed material, in a manner, style or form which imitates or is confusingly similar to Domino's use of the Domino's Marks or otherwise indicates or tends to represent that they are authorized, associated, affiliated, sponsored or approved by Domino's.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that:

1. A judgment is hereby entered in favor of Domino's and against the defendants, El-Tan, Inc., Michael A. Ellis and Danny Tan Sheau Yang, in the amount of $37,383.80 plus interest at a rate of two percent (2%) per month from February 27, 1995;

2. A judgment is hereby entered in favor of Domino's and against the defendant, Elvieanna Lynne Potts, in the amount of $16,323.15 plus interest at a rate of two percent (2%) per month from February 27, 1995; and

3. A judgment is hereby entered in favor of Domino's and against the defendants, B.A. Enterprises, Inc., Lewis Wayne Humbyrd, Ronald Predl and Jerry Evans, in the amount of $18,062.90 plus interest at a rate of two percent (2%) per month from February 27, 1995.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the claim of Domino's against the defendants, Owasso Pizza, Inc., Michael A. Ellis and Wayne Salisbury, in the amount of $2,659.85 plus interest at a rate of one and one-half percent (1.5%) per month from February 27, 1995 is hereby dismissed with prejudice, pursuant to an agreement between the parties, with the parties to bear their own costs and fees herein with respect to, and only with respect to, said dismissed claim.

DATED this 6th day of July, 1995.

THOMAS R. BRETT
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

John M. Gerkin, OBA # 3326
505 East Main
Post Office Box 691
Jenks, OK 74037

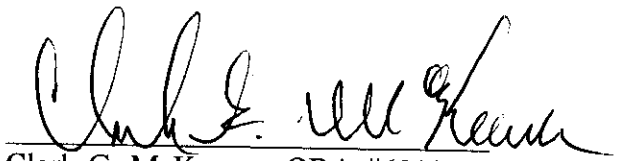
ATTORNEYS FOR DEFENDANTS
EL-TAN, INC., OWASSO PIZZA, INC.,
B.A. ENTERPRISES, INC., ELVIEANNA
LYNNE POTTS, MICHAEL A. ELLIS,
DANNY TAN SHEAU YANG, LEWIS W. HUMBYRD,
RONALD PREDL AND JERRY EVANS

Kathryn L. Taylor, OBA # 3079
Jon Ed Brown, OBA #16186

- Of the Firm -

CROWE & DUNLEVY
Kennedy Bldg., Suite 500
321 South Boston
Tulsa, OK 74103
(918) 592-9800

ATTORNEYS FOR PLAINTIFF
DOMINO'S PIZZA, INC.



Clark G. McKeever, OBA #6019
15th Fl., Continental Tower
P. O. Box 1026
Enid, OK 73702-4137

ATTORNEYS FOR WAYNE SALISBURY

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JUL 6 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

HOMEWARD BOUND, INC. et al.,

Plaintiffs,

v.

THE HISSOM MEMORIAL CENTER, et. al.,

Defendants.

Case No. 85-C-437-E

ENTERED ON DOCKET

DATE JUL 07 1995

ORDER & JUDGMENT

Plaintiffs' counsel, Bullock & Bullock, filed an Attorney Fee Application on June 6, 1995 for an award of attorney fees and expenses in accordance with the December 23, 1989 order and stipulation of the parties.

The Court has reviewed the application for fees and approves the Stipulation of the parties.

The Court hereby award the firm Bullock & Bullock uncontested attorney fees in the amount of $ 49,156.25 and out-of-pocket expenses in the amount of $ 4,562.19.

IT IS THEREFORE ORDERED that the Department of Human Services shall pay Plaintiffs' counsel, Bullock & Bullock, attorney fees in the amount of $ 49,156.25 plus expenses in the amount of $ 4,562.19, and a judgment in the amount of $ 53,718.44 is hereby entered on this day. A hearing on the contested issue will be set by the Court

ORDERED this 30 day of June 1995.

S/ JAMES O. ELLISON

JAMES O. ELLISON
United States District Court

Louis W. Bullock
Patricia W. Bullock
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320 South Boston
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ATTORNEYS FOR PLAINTIFFS

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Assistant Attorney General
OFFICE OF THE ATTORNEY GENERAL
4545 North Lincoln, Suite 260
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(405) 521-4274

ATTORNEY FOR DEFENDANTS

(HB-ORD29.FEE)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARRIOTT CORPORATION, Plaintiff and Counter-Defendant, vs. RESOLUTION TRUST CORPORATION AS RECEIVER FOR MERCURY FEDERAL SAVINGS AND LOAN ASSOCIATION, Defendant and Counter-Plaintiff, RESOLUTION TRUST CORPORATION AS CONSERVATOR FOR MERCURY SAVINGS & LOAN ASSOCIATION, Plaintiff, vs. CHESAPEAKE HOTEL LIMITED PARTNERSHIP AND MARRIOTT HOTELS, INC., Defendants.	Case No. 89-C-225-E No. 90-C-138-E (Consolidated)

ORDER

NOW on this 30th day of June, 1995, comes on for hearing the motion of Tulsa Garnett Hotel Ventures, L.L.C. ("TGHV") to be substituted as the proper party plaintiff and real party in interest with respect to any further proceedings filed in aid of or related to execution on the judgment rendered herein. The Court, being advised in the premises, finds that said motion should be granted, and

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that TGHV be and is hereby substituted as the proper party plaintiff to pursue any and all rights available to as successor-in-interest of the Resolution Trust Corporation as Receiver for Mercury Federal

Savings and Loan Association, including rights and remedies relative to execution on the judgment rendered herein on the 21st day of June, 1991, as well as to realize upon any collateral subject to its judgment or other security interests or liens assigned to it as the successor in interest of the RTC.

IT IS SO ORDERED,

Dated this 30 day of June, 1995.

UNITED STATES DISTRICT COURT JUDGE

HALL, ESTILL, HARDWICK, GABLE,
GOLDEN & NELSON, P.C.
James M. Reed, OBA #7466
320 South Boston, Suite 400
Tulsa, Oklahoma 74103
(918) 594-0400

ATTORNEYS FOR TULSA GARNETT HOTEL VENTURES, L.L.C.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

EDDIE L. ANDERSON,

Plaintiff,

vs.

UNITED STATES FIDELITY AND GUARANTY COMPANY, a foreign corporation,

Defendant.

Case No. 94-C-1193-B

O R D E R

Before the Court is a Motion for Summary Judgment (Docket #8), pursuant to Fed. R. Civ. P. 56, filed by Defendant United States Fidelity and Guaranty Company ("USF&G"). The Plaintiff, Eddie L. Anderson ("Anderson"), alleges bad faith refusal to pay under a workers' compensation insurance contract and intentional infliction of emotional distress against USF&G.

I. UNCONTROVERTED FACTS

1. Plaintiff filed an Amended Petition in May 1993 alleging that USF&G breached its duty of good faith and fair dealing in the handling of his workers' compensation claim. (Defendant's Brief in Support of Motion for Summary Judgment, Exh. A)

2. At the time of Anderson's initial injury, USF&G was the workers' compensation insurer for Anderson's former employer, the L.B. Jackson Drilling Company. (Zumalt Affidavit, Defendant's Exh. B)

3. Anderson was initially injured while on the job when an object thrown from a lawn mower struck his left eye. (Defendant's Exh. A)

4. Plaintiff filed a workers' compensation claim against his employer, and was adjudged on March 18, 1988, to be 100 percent permanently partially disabled in his left eye. (Defendant's Exh. A)

5. The manner in which USF&G handled Anderson's workers' compensation claim from its inception until April 1991 is not at issue in this lawsuit. (Defendant's Exh. C, ¶ 1)

6. On April 1, 1991, Anderson filed a Motion to Reopen his workers' compensation claim, alleging that he had suffered a change of condition for the worse. (Defendant's Exh. D)

7. On April 29, 1991, USF&G filed a Form 10, contesting that Anderson suffered a change of condition for the worse, and also filed an objection to the medical report attached to the Motion to Reopen. (Defendant's Exh. E and F)

8. On January 21, 1992, USF&G accepted Anderson's change of condition as compensable, and authorized medical treatment. (Defendant's Exh. G and H)

9. On June 17, 1992, the Workers' Compensation Court awarded Anderson temporary total disability benefits ("TTD") of $2,224.34 for the period of February 26, 1992, through June 1992. The court reserved for consideration Anderson's request for TTD from June 1991 to February 1992. (Defendant's Exh. I)

10. On July 2, 1992, USF&G issued a check to Anderson in

payment of the June 17, 1992, court order. (Defendant's Exh. B and J)

11. On January 7, 1993, the Workers' Compensation Court awarded Anderson TTD of $5,450.86 for the period of June 1991 through February 1992. (Defendant's Exh. K)

12. On February 11, 1993, USF&G issued a check to Anderson in payment of the January 7, 1993, court order. (Defendant's Exh. B and L)

13. Anderson alleges that USF&G breached its duty of good faith and fair dealing. (Defendant's Exh. A and C)

14. Anderson has not alleged that USF&G failed to comply timely with Workers' Compensation Court orders. (Defendant's Exh. A and C)

II. SUMMARY JUDGMENT STANDARD

Summary judgment pursuant to Fed. R. Civ. P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Windon Third Oil & Gas v. FDIC, 805 F.2d 342 (10th Cir. 1986). In Celotex, the court stated:

> The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

477 U.S. at 317 (1986). To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585 (1986). The evidence and inferences therefrom must be viewed in a light most favorable to the nonmoving party. Conaway v. Smith, 853 F.2d 789, 792 n.4 (10th Cir. 1988). Unless the Defendants can demonstrate their entitlement beyond a reasonable doubt, summary judgment must be denied. Norton v. Liddel, 620 F.2d 1375, 1381 (10th Cir. 1980).

The Tenth Circuit Court of Appeals stated:

> Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." . . . Factual disputes about immaterial matters are irrelevant to a summary judgment determination . . . We view the evidence in a light most favorable to the nonmovant; however, it is not enough that the nonmovant's evidence be "merely colorable" or anything short of "significantly probative."
>
> * * *
>
> A movant is not required to provide evidence negating an opponent's claim . . . [r]ather, the burden is on the nonmovant, who "must present affirmative evidence in order to defeat a properly supported motion for summary judgment." . . . After the nonmovant has had a full opportunity to conduct discovery, this burden falls on the nonmovant even though the evidence probably is in possession of the movant. (Citations omitted.)

Committee for the First Amendment v. Campbell, 962 F.2d 1517, 1521 (10th Cir. 1992).

III. LEGAL ANALYSIS

This Motion deals solely with the circumstances under which a workers' compensation insurance carrier may be liable for bad faith in connection with a claimant's workers' compensation award. In Goodwin v. Old Republic Ins. Co., 828 P.2d 431 (Okla. 1992), the Oklahoma Supreme Court stopped short of expressly holding that a workers' compensation carrier could be liable for bad faith. The Goodwin court noted that an "insurer's implied-in-law duty of good faith and fair dealing extends to all types of insurance companies and insurance policies" and concluded that a bad faith tort action against an employer's insurance company would not fall within the exclusive purview of the Workers' Compensation Court. Id. at 432-35. The Goodwin court simply "assumed" that a workers' compensation insurance company may be subjected to a bad faith claim, but held that the facts of the case did not support such an award. Id. at 435.

USF&G alleges that bad faith liability only applies when there is a failure to pay an award of the Workers' Compensation Court. USF&G states that Oklahoma does not recognize a bad faith cause of action arising out of the manner in which an insurer litigates a workers' compensation claim.

USF&G points to Whitson v. Oklahoma Farmers Union Mutual Ins. Co., 889 P.2d 285 (Okla. 1995), in which the plaintiff sued his employer for bad faith, based upon the employer's conduct before an award was entered in Workers' Compensation Court in the plaintiff's favor. Whitson, in explaining Goodwin, stated that

> We also held in Goodwin that "a bad faith claim is separate and apart from the work relationship, and it arises against the insurer only after there has been an award against the employer ... The same limitation applies where the employer's bad faith in the handling of the claim is concerned.

Id. at 287. The Whitson court then denied the bad faith claim, because the claim "involves [the employer's] conduct before the Workers' Compensation Court entered any award against [the employer]. Thus, [the employer's] acts were not actionable and could not have been so." Id. at 287-88. The Whitson court further noted that

> There is no reason to allow a tort cause of action for a too aggressive defense of a workers' compensation claim ... A successful plaintiff in a personal injury action certainly has no cause of action against the defendant for the defendant's unsuccessful attempts to defeat of action against the defendant for the defendant's unsuccessful attempts to defeat the suit.

Under Whitson, both employers and the workers' compensation carrier apparently are not liable for any conduct that occurs before a Workers' Compensation Court award is issued. In this case, the conduct of which Anderson complains occurred before the Workers' Compensation Court award was entered.[1] Therefore, the Court believes that Defendant's Motion for Summary Judgment should be and is hereby GRANTED. The Motion for Summary Judgment did not address Anderson's Intentional Infliction of Emotional Distress claim;

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[1]The undisputed evidence indicates that USF&G was not under an ongoing duty to Anderson under the March 18, 1988, Workers' Compensation Court order. Rather, USF&G was required only to pay a lump-sum award. (Defendant's Reply Brief, Exh. A)

therefore, it remains for adjudication.[2]

IT IS SO ORDERED THIS 5 DAY OF JUNE, 1995.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

[2]The Motion and Response dealt only with whether Oklahoma law recognizes a cause of action against a worker's compensation insurance carrier for actions taken before an award is entered in Workers' Compensation Court; they did not address whether USF&G's conduct constituted the tort of Intentional Infliction of Emotional Distress.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RONALD E. HENDERSON,
Plaintiff,
vs.
INTER-CHEM COAL CO., INC.,
Defendant.

Case No. 91-C-513-E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RONALD E. HENDERSON,
Plaintiff,
vs.
NATIONWIDE MINING, INC., et al.,
Defendants.

Case No. 91-C-825-E

DISMISSAL WITH PREJUDICE

COMES NOW the Plaintiff in the above entitled actions, **Ronald E. Henderson**, and hereby dismisses both actions with prejudice, with the further understanding that each side is responsible for the payment of their own attorney's fees and costs.

STEPHEN R. HICKMAN, ESQ.
Attorney for Plaintiff

By: _____
Stephen R. Hickman
1700 SW Boulevard
Suite 100
Tulsa, Oklahoma 74101

_____
ATTY FOR DEFENDANTS

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the above and foregoing Dismissal With Prejudice on the 23rd day of June, 1995, with proper postage fully prepaid thereon to:

David W. Mills, Esq.
610 South Main, Suite 212
Tulsa, Oklahoma 74119-1257

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JUN - 5 1995

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

JOHN ZINK, MARIE JETT, KENT CARAWAY, SWANNIE TARBEL, DARTON J. ZINK, JILL HOTTIWATA and MICHAEL BARTELL, Trustees of THE JOHN ZINK FOUNDATION,	)	
Plaintiffs,	)	Case No. 95-C-18-B(H)
v.	)	
A. SCOTT BROGNA, W.T. MOORE, MAYABB OIL COMPANY, UNIQUE OIL CO., and PAYSTONE OIL COMPANY,	)	ENTERED ON DOCKET DATE JUL 0 6 1995
Defendants	)	

REPORT AND RECOMMENDATION OF U. S. MAGISTRATE JUDGE

This report and recommendation pertains to Defendants' Application for Hearing to Determine Jurisdiction and Motion for an Injunction to Maintain Status Quo (Docket #3)[1] and Defendants' oral motion to dismiss the complaint. A hearing was held on February 27, 1995 and continued on May 25, 1995, oral arguments were heard, and evidence and witnesses were presented.

Plaintiffs are Trustees of The John Zink Foundation ("Foundation"), which owns a large ranch in Osage County, Oklahoma, maintained for use and enjoyment by the public, which is called the "Zink Ranch" ("Ranch"). Facilities used by the Indian Nations Council of Boy Scouts and the Magic Empire Council of Girl Scouts are located on the ranch, as well as facilities for shooting sports, horseback riding, and other activities. Defendants are

[1] "Docket numbers" refer to numerical designations assigned sequentially to each pleading, motion, order, or other filing and are included for purposes of record keeping only. "Docket numbers" have no independent legal significance and are to be used in conjunction with the docket sheet prepared and maintained by the United States Court Clerk, Northern District of Oklahoma.

(14)

owners and operators of oil and gas leases on the Ranch. The Osage Indian Tribe owns the minerals underlying the Ranch and Defendants' leases were acquired from the Tribe.

Prior to 1978, Defendants (or their predecessors in interest) obtained access to their leases via an unpaved road ("Guilfoyl Road") from the southwest corner of the Ranch which traversed for some distance property owned by Paul Guilfoyl and then crossed the Zink Ranch. In 1978, the Foundation built a new unpaved road ("main road") to provide public access to the Ranch, which began at its south border at the north end of state highway 97. At some point in time, Defendants began to use the main road for access to their lease sites for pickup trucks, and heavy vehicles such as large water and other service trucks, Kerr McGee's 18-wheel, 80,000 lb. oil transport trucks, and well servicing equipment.

In 1989, the Foundation complained of the damage to the main road caused by Defendants' heavy vehicles and requested that Defendants cease using the main road and instead use the Guilfoyl Road to access their leases. Defendants refused. On December 1, 1989 and March 6, 1990, the Osage Agency Superintendent for the Bureau of Indian Affairs ("Superintendent") indicated in letters that the reasonable route of ingress and egress for Defendants was the main road, but that Defendants would be required to repair any damage to the road caused by their operations. These decisions were not appealed. On May 24, 1995, the Superintendent once more determined the route should be the main road.

From 1989 to 1994, the road suffered substantial damage and wear attributable in part to the heavy traffic by Defendants. The Foundation paid for repairs and maintenance,

and asked for a contribution from the Defendants. However, the Defendants squabbled among themselves as to who was responsible for what damages, and nothing was paid. Ultimately, Plaintiff realized that these disputes between the Defendants could not be resolved in a way that was economically viable, and gave up its efforts to obtain payment for road repairs.

In late 1993, the Foundation decided to pave the main road to provide better and safer access for the public traffic at the Ranch. Acting on behalf of the Foundation, John Zink arranged for a meeting to discuss the plans with Defendant Scott Brogna, the Superintendent, and several others. At that meeting, Mr. Zink agreed to build an alternate road to provide Defendants access to their lease sites. The dirt road ("alternative road") enters the Zink Ranch from a county road, and traverses two stream beds.[2] The path for the alternative road was bulldozed in May 1994 at a cost of approximately $5,000.

In October, 1994, the Foundation applied a "chip and seal" pavement over a substantial portion of the main road at a cost of $100,000.[3] A sign was then posted at the gated entrance to the road prohibiting heavy vehicle traffic.[4] Plaintiff explains that it has taken this action to avoid the inevitable damage to both the road surface and road bed, and

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[2]Defendants vigorously contend that this "alternative road" does not provide the needed heavy truck access to their leases. Kerr McGee officials have refused to allow their large oil tank trucks to negotiate it. Although this point may have been debatable when the road was first bulldozed, the stream crossings have since washed out, and no access was possible at the time the hearing reconvened. Defendants assert that the alternative dirt road will never be a viable means of access due to the low elevation of the land it traverses, and the problems caused by the flow of water across that land. In contrast, the main road follows a ridge, and has no such problems.

[3]Additional paving will be completed in the Summer of 1995, and ultimately about 10 miles of road will be paved.

[4]The parties agree that not all access to the leases by way of the main road has been blocked. Plaintiff has allowed, and says that it will continue to allow, auto and light truck traffic access to the leases by means of the main road. Only the heavy truck traffic has been blocked. All parties also agree that this heavy truck traffic will undoubtedly damage the recently constructed "chip and seal" pavement.

to minimize the public safety concern which arises when the access route for passenger vehicles to scouting facilities and for heavy trucks to oil leases is shared.

After the route of the alternative road was bulldozed, Defendants continued to use the main road, claiming there was no other viable route, as the Guilfoyl Road had been closed off to them by Mr. Guilfoyl and the alternative road was too rough and slow for 18-wheelers.[5] The costs to repair the damage which will be caused to the main road, if heavy truck traffic is allowed, substantially exceeds the cost necessary to upgrade the alternate road, or to maintain the Guilfoyl Road so as to allow heavy trucks access to Defendants' leases.[6]

On January 6, 1995, Plaintiffs brought this action for declaratory relief, asserting that this court has subject matter jurisdiction based upon 28 U.S.C.A. § 1331. On January 30, 1995, Defendants filed an action involving the same issues against the Plaintiffs in Case No. CJ-95-28, in the District Court of Osage County, Oklahoma. The state court stayed further action in the case while proceedings are pending in this federal court action.

Defendants claim they are not able to access their oil and gas leases with oil transport trucks and well workover trucks, and as a result nineteen (19) of their wells have had to be shut in because their oil storage tanks and/or water storage tanks are full and cannot be emptied. Defendants also claim that ten wells have been shut in due to

---

[5]Defense counsel advised the court at the hearing that Mr. Guilfoyl had retained counsel to resist the use of his property as a means of access to the Zink Ranch leases, but he was not represented at the hearing.

[6]Joe Pitts, the President of Poe and Associates, an engineering firm with recognized road building experience, was stipulated to be an expert in the field. He testified that heavy truck traffic would damage not only the chip and seal road surface, but also the underlying road bed, and estimated the cost of repair to be $20,000 to $30,000 per mile. He also said that the cost of upgrading the alternative road would vary according to the type of surface that was desired, but the road could be upgraded sufficiently to permit heavy truck traffic for considerably less than the anticipated cost to repair to the main road, if the alternative road was maintained as a dirt or dirt and gravel road.

mechanical problems which cannot be repaired without the use of well workover trucks.

Under federal law, 25 U.S.C. § 396d, federal regulations control all operations under oil, gas or other mineral leases affecting restricted Indian lands:

> All operations under any oil, gas, or other mineral lease issued pursuant to the terms of this or any other Act affecting restricted Indian lands shall be subject to the rules and regulations promulgated by the Secretary of the Interior. In the discretion of the said Secretary, any lease for oil or gas issued under the provisions of this Act shall be made subject to the terms of any reasonable cooperative unit or other plan approved or prescribed by said Secretary prior or subsequent to the issuance of any such lease which involves the development or production of oil or gas from land covered by such lease.

The Code of Federal Regulations, 25 C.F.R. § 226.18 and § 226.19, authorizes the Superintendent to designate the route of ingress and egress in the event of a dispute between a land owner and an oil and gas lessee.

This is an action for declaratory judgment and injunctive relief pursuant to 28 U.S.C. § 2201, et seq. This court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331, as the controversy is based on the effect of agency action under 25 C.F.R. §§ 226.18 and 226.19, and the rights claimed by Defendants are based upon the Indian Mineral Leasing Act, 25 U.S.C. § 396d. Tenneco Oil Co. v. The Sac & Fox Tribe of Indians of Oklahoma, 725 F.2d 572, 575 (10th Cir. 1984).

Defendants claim the complaint presents only a state law question regarding possession of privately owned land and thus no independent ground for federal jurisdiction exists under the well pleaded complaint rule set out in Oklahoma Tax Commission v. Graham, 489 U.S. 838, 842 (1989). However, paragraph three of the complaint, dealing

with jurisdiction, states that this dispute concerns access to wells, "the leasing of which is governed by the Code of Federal Regulations, 25 C.F.R. § 226 et seq." While the Defendants also base their defense on the Superintendent's designations of the main road as the route they can use, it is clear that Plaintiffs recognized that federal law and Indian lands were involved in the case, giving the federal court jurisdiction. The right asserted by Plaintiffs depends upon the construction and effect of a federal regulation.

The Plaintiffs did not appeal the Superintendent's December 1, 1989 and March 6, 1990 decisions relating to the main road route of ingress and egress. Under 25 C.F.R. §§ 226.20 and 226.21, a person with an interest in any leased tract or in damages thereto must furnish a written statement to the Superintendent and failure to do so "shall constitute a waiver of notice and estop said person from claiming any part of such damages." 25 C.F.R. § 226.20. Therefore, when this suit was filed, administrative remedies had been exhausted.[7] While the Superintendent made a third determination on May 24, 1995, which Plaintiffs claim they will appeal, this has no bearing on the present request for preliminary injunctive relief.

In order to obtain a preliminary injunction, Defendants must establish each of the following elements: (1) substantial likelihood that Defendants will eventually prevail on the merits; (2) that Defendants will suffer irreparable injury unless the injunction issues; (3) that the threatened injury to Defendants outweighs whatever damage the proposed injunction may cause to the Foundation; and (4) that the injunction, if issued, will not be

[7]Plaintiff claims that the Superintendent's decisions were procedurally flawed, and consequently have no force and effect. In light of the court's disposition of defendants' request for injunctive relief, there is no need to reach this issue, and the court has assumed for purposes of this opinion that the prior decisions of the Superintendent were valid and binding on Plaintiff.

adverse to the public interest. SCFC ILC, Inc. v. VISA USA Inc., 936 F.2d 1096, 1098 (10th Cir. 1991).

Defendants' Motion for an Injunction to Maintain Status Quo (Docket #3) should be denied. Defendants have shown a likelihood of success on the merits because the Superintendent, as authorized by 25 C.F.R. § 226.18 and § 226.19, has previously designated the main road as the route of ingress and egress to be used by the oil and gas lessees.[8] This designated route has not been revoked or changed by the Superintendent.

However, Defendants have not shown that they will suffer irreparable harm if injunctive relief is not granted. Any damage to wells that have had to be shut in, deprivation of cash flow necessary to effectively operate, and denial of additional exploration activities can be compensated by money damages. On balance, Plaintiffs will be more seriously damaged by the granting of injunctive relief because of inevitable damage to the new "chip and seal" pavement. Finally, the issuance of the injunction will be adverse to a direct public interest in access to the Zink Ranch for numerous outdoor activities. On the other hand, the enactment of statutory and regulatory provisions governing the extraction of minerals from restricted Indian land is indicative of a public interest in the protection of Native American royalty interests. Beyond that special public interest is the overall public policy which favors protection of correlative mineral rights and abhors waste. However, given the small amounts involved in this instance, and the

[8]It is not at all certain, however, that the third determination to this effect will be upheld on appeal, given the substantial change of condition of the road and the comparative economic considerations involved. The parties agree that the leases in question contain only "marginal" stripper wells. Defendant Brogna, for example, estimated that his net profit for the year was $500, and Virgil Mayabb, principal of Defendant Mayabb Oil Company, estimated that its net profit last year was $2500. It appears the cost of repairing the "chip and seal" road, once damaged by heavy truck traffic, will be well in excess of any net cash flow generated by the leases in question.

availability of money damages, the court concludes that those public interests will not be significantly disserved by a denial of the injunctive relief requested. Moreover, the motion for a preliminary injunction at issue has not been pursued by Native American royalty interests or those public agencies charged with their protection, but rather by those holding private property interests in the leases, who are primarily concerned with the impact that closure of the main road may have on their investment's profitability.

Defendants' oral motion to dismiss the complaint should be denied. The rule for reviewing the sufficiency of any complaint is that the "'complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief". Scheuer v. Rhodes, 416 U.S. 232, 236 (1974) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). A court may dismiss an action for failure to state a cause of action "only if it is clear that no relief could be granted under any set of facts which could be proved". Hishon v. King & Spalding, 467 U.S. 69, 73 (1984). The court is not convinced that Plaintiffs will be unable to prove facts in support of their claim that would entitle them to relief.

Dated this 2nd day of June, 1995.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

T:Zink1.rr

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

RANDY L. WATKINS,

Plaintiff,

vs.

CLUB CAR, INC., a Delaware Corporation,

Defendant.

Case No. 94-C-1196-BU

JUDGMENT

This action came before the Court upon Defendant's Motion for Summary Judgment, and the issues having been duly considered and a decision having been duly rendered,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that judgment is entered in favor of the defendant, Club Car, Inc., a Delaware Corporation, and against the plaintiff, Randy L. Watkins, and that the defendant, Club Car, Inc., a Delaware Corporation, recover of the plaintiff, Randy L. Watkins, its costs of action.

Dated at Tulsa, Oklahoma, this 30 day of June, 1995.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

22

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

RANDY L. WATKINS,

Plaintiff,

vs.

CLUB CAR, INC.,

Defendant.

Case No. 94-CV-1196-BU

ORDER

This matter comes before the Court upon the defendant Club Car, Inc.'s Motion for Summary Judgment (Docket Entry #12). The plaintiff, Randy L. Watkins, has responded to the motion and the defendant has replied thereto. Upon due consideration of the parties' submissions, the Court makes its determination.

On September 16, 1992, the plaintiff was struck by a golf car, which was owned by his employer, Meadowbrook Country Club in Broken Arrow, Oklahoma. The plaintiff filed this action in the District Court of Tulsa County, Oklahoma on September 23, 1994, seeking damages against the defendant based upon the theories of manufacturers' products liability, negligence and breach of warranty.[1] On December 30, 1994, this action was removed to this Court by the defendant.

In its motion, the defendant contends that it is entitled to summary judgment as to the plaintiff's manufacturers' products liability and negligence claims on the basis they are barred by the

[1]In his petition, the plaintiff also named Meadowbrook Country Club and Justice Golf Car Co., Inc. as defendants. However, on November 29, 1994, the plaintiff dismissed his petition against these defendants.

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two-year statute of limitations set forth in Okla. Stat. tit. 12, § 95(3). The defendant also contends that it is also entitled to summary judgment on the plaintiff's breach of warranty claim because the plaintiff lacks privity of contract. Specifically, the defendant argues that under Oklahoma law, warranties do not extend to employees of the purchaser of a product.

The plaintiff, in response, argues that the defendant has waived the affirmative defenses of statute of limitations and lack of privity because it failed to plead those defenses in its original answer. In regard to his breach of warranty claim, the plaintiff argues that Okla. Stat. tit. 12A, § 2-318 should be construed liberally and that he should be considered a third party beneficiary of the warranties extended to his employer.

The Court has previously denied the plaintiff's motion seeking to strike the defendant's amended answer asserting the affirmative defenses of statute of limitations and lack of privity. Rule 15(a) of the Federal Rules of Civil Procedure provides that leave to amend shall be freely given when justice so requires. This rule applies to amending answers to plead affirmative defenses such as the statute of limitations and lack of privity. Bodenhamer Building Corp. v. Architectural Research Corp., 106 F.R.D. 521 (E.D. Mich. 1985); Eastridge v. Fruehauf Corporation, 52 F.R.D. 129 (W.D. Ky 1971). The plaintiff has not shown in his response to the defendant's motion any justifiable reason, such as undue delay, bad faith, dilatory motive on the part of the defendant, failure to cure deficiencies by amendments previously allowed, undue prejudice

to the plaintiff, see, Foman v. Davis, 371 U.S. 178, 182 (1962), for the Court to strike the defendant's amended answer. The Court therefore declines to revisit the issue.

As it is undisputed the plaintiff's petition was not filed within two years of the date of the alleged injury, the Court finds that the plaintiff's action is barred by the two-year statute of limitations set forth in Okla. Stat. tit. 12, § 95(3).

In regard to the plaintiff's breach of warranty claim, the Court finds that the plaintiff's claim fails as a matter of law as section 2-318 does not extend coverage to employees of the purchaser of the alleged defective product. Hester v. Purex Corporation Ltd., 534 P.2d 1306 (Okla. 1975).

Accordingly, the defendant Club Car, Inc.'s Motion for Summary Judgment (Docket #12) is GRANTED. Judgment shall issue forthwith.

ENTERED this 30th day of June, 1995.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, on behalf of Consolidated Farm Service Agency, formerly Rural Economic and Community Development, formerly Farmers Home Administration,	)	
Plaintiff,	)	
v.	)	
CLAUDE L. DAVIS, JR.; LINDA G. DAVIS; FARM CREDIT SERVICES, formerly Federal Land Bank of Wichita; FIRST NATIONAL BANK OF NOWATA; COUNTY TREASURER, Nowata County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Nowata County, Oklahoma,	)	
Defendants.	)	CIVIL ACTION NO. **95-C-243-B**

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 3rd day of July, 1995. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Cathryn D. McClanahan, Assistant United States Attorney; the Defendants, **County Treasurer, Nowata County, Oklahoma, and Board of County Commissioners, Nowata County, Oklahoma**, appear by Stephen A. Kunzweiler, Assistant District Attorney, Nowata County, Oklahoma; the Defendant, **Farm Credit Services, formerly Federal Land Bank of Wichita, now known as Farm Credit Bank of Wichita**, appears by its attorney Dominic Sokolosky; the Defendant, **First National Bank of Nowata**, appears by its attorney James R. Johnson; and the Defendants, **Claude L. Davis, Jr. and Linda G. Davis**, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendants, **Claude L. Davis, Jr. and Linda G. Davis**, were served with Summons and Complaint on May 9, 1995 by the United States Deputy Marshal; that the Defendant, **Farm Credit Services, formerly Federal Land Bank of Wichita, now known as Farm Credit Bank of Wichita**, executed a Waiver of Service of Summons on March 28, 1995 which was filed on April 3, 1995; that the Defendant, **First National Bank of Nowata**, executed a Waiver of Service of Summons on March 17, 1995 which was filed on March 20, 1995; that the Defendant, **County Treasurer, Nowata County, Oklahoma**, was served with Summons and Complaint on March 17, 1995 by certified mail, return receipt requested, delivery restricted to the addressee; that the Defendant, **Board of County Commissioners, Nowata County, Oklahoma**, was served on March 17, 1995 with Summons and Complaint by certified mail, return receipt requested, delivery restricted to the addressee.

It appears that the Defendants, **County Treasurer, Nowata County, Oklahoma, and Board of County Commissioners, Nowata County, Oklahoma**, filed their Answer on May 1, 1995; that the Defendant, **Farm Credit Services, formerly Federal Land Bank of Wichita, now known as Farm Credit Bank of Wichita**, filed its Answer on May 8, 1995; that the Defendant, **First National Bank of Nowata**, filed its Answer on May 15, 1995; and that the Defendants, **Claude L. Davis, Jr. and Linda G. Davis**, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon certain promissory notes and for foreclosure of a mortgage securing part of the said promissory notes upon the

following described real property located in Nowata County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot 10, in Pin Oak Subdivision according to the amended plat thereof, a subdivision in Nowata County, Oklahoma.

The Court further finds that this is a suit for the further purpose of foreclosure of security agreements on certain personal property located within the Northern District of Oklahoma.

The Court further finds that the Defendant, Farm Credit Services, formerly Federal Land Bank of Wichita, is now known as Farm Credit Bank of Wichita.

The Court further finds that Claude L. Davis, Jr. and Linda G. Davis executed and delivered to the United States of America, acting through the Farmers Home Administration, formerly Rural Economic and Community Development, now known as Consolidated Farm Service Agency, the following promissory notes.

Loan Number	Original Amount	Date	Interest Rate
44-01	$ 81,000.00	03/02/83	10.25%
44-06	90,530.82	04/25/84	10.25%
44-11	96,962.85	01/03/85	7.25%
44-16	110,560.23	12/10/86	4.50%
44-18	120,523.46	04/21/89	6.50%
43-04*	34,240.00	05/29/84	5.00%
43-09	18,591.51	01/03/85	5.00%
43-14	18,582.19	12/10/86	4.50%
43-20	20,445.41	04/21/89	4.50%
29-03*	92,760.00	05/29/84	10.25%

Loan Number	Original Amount	Date	Interest Rate
29-08	98,464.74	01/03/85	10.25%
29-13	105,954.19	12/10/86	7.50%
29-19	27,454.21	04/21/89	7.50%
44-05	16,190.00	07/06/84	10.25%
44-10	17,012.92	01/03/85	10.25%
44-15	18,116.91	12/10/86	4.50%
44-21	19,749.56	04/21/89	6.50%

***Secured by the real estate mortgage described below.**

The Court further finds that as security for the payment of the above-described notes 29-03 and 43-04, Claude L. Davis, Jr. and Linda G. Davis executed and delivered to the United States of America, acting through the Farmers Home Administration, formerly Rural Economic and Community Development, now known as Consolidated Farm Service Agency, the following real estate mortgage which mortgage covers the above-described property, situated in the State of Oklahoma, Nowata County.

Instrument	Dated	Filed	County	Book	Page
Real Estate Mortgage	05/29/84	05/31/84	Nowata	552	350

The Court further finds that as collateral security for the payment of the above-described notes, Claude L. Davis, Jr. and Linda G. Davis executed and delivered to the United States of America, acting through the Farmers Home Administration, formerly Rural Economic and Community Development, now known as Consolidated Farm Service Agency, the following financing statements and security agreements thereby creating in favor of the Farmers Home Administration, formerly Rural Economic and Community

Development, now known as Consolidated Farm Service Agency, a security interest in certain crops, livestock, farm machinery and motor vehicles described therein.

Instrument	Dated	Filed	County	File Number
Financing Stmt.	05/31/84	05/31/84	Nowata	716
Continuation Stmt.	02/07/89	02/07/89	Nowata	61
Continuation Stmt.	03/02/94	03/02/94	Nowata	107
Financing Stmt.	06/01/84	06/01/84	Rogers	2544
Continuation Stmt.	02/09/89	02/09/89	Rogers	244
Continuation Stmt.	03/03/94	03/03/94	Rogers	311
EFS-1	11/10/88	11/10/88	Secretary of State	882864
EFS-3	09/07/93	09/07/93	Secretary of State	882864C
Security Agreement	03/02/83			
Security Agreement	06/14/83			
Security Agreement	05/29/84			
Security Agreement	05/17/85			
Security Agreement	07/17/86			
Security Agreement	08/15/87			
Security Agreement	09/26/88			
Security Agreement	11/14/89			
Security Agreement	09/12/90			
Security Agreement	01/30/91			

The Court further finds that the Defendants, Claude L. Davis, Jr. and Linda G. Davis, made default under the terms of the aforesaid notes, mortgage and security agreements by reason of their failure to make the yearly installments due thereon, which default has continued, and that by reason thereof the Defendants, **Claude L. Davis, Jr. and Linda G. Davis**, are indebted to the Plaintiff in the principal sum of $185,709.92, plus accrued interest in the amount of $54,954.81 as of May 9, 1994, plus interest accruing

thereafter at the rate of $32.77 per day until judgment, plus interest thereafter at the legal rate until fully paid. Of the above amounts, Plaintiff alleges that there is now due and owing under the notes secured by the real estate mortgage after full credit for all payments made, the principal sum of $46,512.83, plus accrued interest in the amount of $11,127.89 as of May 9, 1994, plus interest accruing thereafter at the rate of $7.975 per day until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of $55.00 ($45.00 fees for service of Summons and Complaint and $10.00 fee for recording Notice of Lis Pendens).

The Court further finds that the Defendants, **County Treasurer, Nowata County, Oklahoma and Board of County Commissioners, Nowata County, Oklahoma,** have a lien on the property which is the subject matter of this action by virtue of ad valorem taxes in the amount of $933.85, plus penalties and interest, for the year 1994. Said lien is superior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, **County Treasurer, Nowata County, Oklahoma and Board of County Commissioners, Nowata County, Oklahoma,** have a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of $690.60, plus penalties and interest, which became a lien on the property as of the year 1994. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, **Farm Credit Services, formerly Federal Land Bank of Wichita, now known as Farm Credit Bank of Wichita,** has a lien on the property which is the subject matter of this action in the amount of $44,166.49 as of

May 5, 1995, together with interest thereafter as provided in the note (currently 9.25 percent) by virtue of a real estate mortgage, dated January 21, 1980, and recorded on January 28, 1980, in Book 511, Page 359 in the records of Nowata County, Oklahoma. Said lien is superior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, **First National Bank of Nowata,** has a first lien on a 1978 Hercules 35 ton, 32 foot Lowboy Trailer, Serial No. K781332 in the amount of $3,000.00 together with interest accrued and accruing thereon from and after March 2, 1995 at the rate of twelve percent (12%) per annum until paid in full, by virtue of a certain Promissory Note No. 887924 which granted a purchase money security interest in the subject trailer which security was perfected by filing of Financing Statement No. 341, on July 9, 1993 in the records of Nowata County, Oklahoma; filing of Financing Statement No. 38416, on July 12, 1993 in the records of Oklahoma County, Oklahoma; and filing of Oklahoma Lien Entry Form with the Oklahoma Tax Commission on July 19, 1993.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting through the Consolidated Farm Service Agency, formerly Rural Economic and Community Development, formerly Farmers Home Administration, have and recover judgment against the Defendants, **Claude L. Davis, Jr. and Linda G. Davis**, in the principal sum of $185,709.92, plus accrued interest in the amount of $54,954.81 as of May 9, 1994, plus interest accruing thereafter at the rate of $32.77 per day until judgment, plus interest thereafter at the current legal rate of 5.53 percent per annum until fully paid, plus any additional sums advanced or to be advanced or expended during this foreclosure action by the Plaintiff for taxes, insurance, abstracting, or

sums for the preservation of the subject property, including the costs of this action. Of the above amounts, Plaintiff alleges that there is now due and owing under the notes secured by the real estate mortgage after full credit for all payments made, the principal sum of $46,512.83, plus accrued interest in the amount of $11,127.89 as of May 9, 1994, plus interest accruing thereafter at the rate of $7.975 per day until judgment, plus interest thereafter at the current legal rate of 5.52 percent per annum until fully paid, plus the costs of this action in the amount of $55.00 ($45.00 fees for service of Summons and Complaint and $10.00 fee for recording Notice of Lis Pendens), plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property and any other advances.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **County Treasurer, Nowata County, Oklahoma and Board of County Commissioners, Nowata County, Oklahoma**, have and recover judgment in the amount of $933.85, plus penalties and interest, for ad valorem taxes for the year 1994, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **County Treasurer, Nowata County, Oklahoma and Board of County Commissioners, Nowata County, Oklahoma**, have and recover judgment in the amount of $690.60, plus penalties and interst, for personal property taxes for the year 1994, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **Farm Credit Services, formerly Federal Land Bank of Wichita, now known as Farm Credit Bank of Wichita**, have and recover judgment in the amount of $44,166.49 as of May 5, 1995, together with interest thereafter as provided in the note (currently 9.25 percent), plus $500.00 attorney fees, by virtue of a real estate mortgage, dated January 21, 1980, and recorded on January 28, 1980, in Book 511, Page 359 in the records of Nowata County, Oklahoma.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **First National Bank of Nowata**, have and recover judgment in the amount of the unpaid indebtedness due at the time of sale for its first purchase money security interest in a 1978 Hercules 35 ton, 32 foot Lowboy Trailer, Serial No. K781332, by virtue of a certain Promissory Note No. 887924 which granted a purchase money security interest in the subject trailer which security was perfected by filing of Financing Statement No. 341, on July 9, 1993 in the records of Nowata County, Oklahoma; filing of Financing Statement No. 38416, on July 12, 1993 in the records of Oklahoma County, Oklahoma; and filing of Oklahoma Lien Entry Form with the Oklahoma Tax Commission on July 19, 1993.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, **Claude L. Davis, Jr. and Linda G. Davis**, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:
In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:
In payment of the judgment rendered herein in favor of the Defendants, County Treasurer, Nowata County, Oklahoma and Board of County Commissioners, Nowata County, Oklahoma, for ad valorem taxes;

Third:
In payment of the judgment rendered herein in favor of the Defendant, Farm Credit Services, formerly Federal Land Bank of Wichita, now known as Farm Credit Bank of Wichita;

Fourth:
In payment of the judgment rendered herein in favor of the Plaintiff;

Fifth:
In payment of the judgment rendered herein in favor of the Defendants, County Treasurer, Nowata County, Oklahoma and Board of County Commissioners, Nowata County, Oklahoma, for personal property taxes.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, **Claude L. Davis, Jr. and Linda G. Davis**, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the personal property (chattels) involved herein and apply the proceeds of the sale as follows:

First:
In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said personal property (chattels);

Second:
In payment of the judgment rendered herein in favor of the Defendant, First National Bank of Nowata;

Third:
In payment of the judgment rendered herein in favor of the Plaintiff.

The surplus from said sales, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real and personal property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real and personal property or any part thereof.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney

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USA v. Claude L. Davis, Jr., et al.
Judgment of Foreclosure
Case No. 95-C-243-B

CDM:css

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JUN 23 1995

USA v. Claude L. Davis, Jr., et al.
Judgment of Foreclosure
Case No. 95-C-243-B

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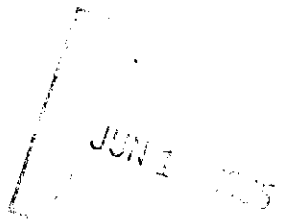

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USA v. Claude L. Davis, Jr., et al.
Judgment of Foreclosure
Case No. 95-C-243-B

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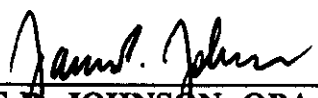

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USA v. Claude L. Davis, Jr., et al.
Judgment of Foreclosure
Case No. 95-C-243-B

CDM:css

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

API01-46

ALFA-PET, INC., Plaintiff, v. VANDIVERE ENTERPRISES, INC. and JAMES VANDIVERE, an individual, Defendants.	)	Civil Action No. 94-CV-882-H

ENTERED ON DOCKET
DATE JUL 0 3 1995

FILED
JUN 30 1995
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JOINT STIPULATION FOR DISMISSAL

Come now the plaintiff, Alfa-Pet, Inc., by and through its attorneys, and the defendants, Vandivere Enterprises, Inc. and James Vandivere, by and through James Vandivere, and having reached a mutually agreeable settlement of the underlying controversy, hereby enter into this Joint Stipulation for Dismissal, whereby they request that the Court dismiss plaintiff's complaint against defendants without prejudice, and retain jurisdiction over the parties and the subject matter for enforcement of the post-judgment remedies provided for in the Settlement Agreement.

Respectfully submitted,

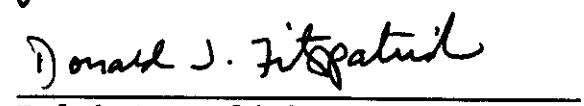
Vandivere Enterprises, Inc.

By: James Vandivere
Name: James Vandivere
Title: President

F:\ALFA\API01496.AL2

James Vandivere, personally

By: 
James Vandivere



Ralph W. Kalish, Jr.
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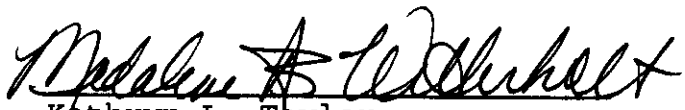

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ATTORNEYS FOR PLAINTIFF

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

PRODUCERS OIL COMPANY and CHARLES GOODALL REVOCABLE TRUST,

Plaintiffs,

vs.

HARTFORD FIRE INSURANCE COMPANY,

Defendant.

Case No. 93-CV-431-H

JUDGMENT

This action came before the Court for a trial by jury. The issues have been tried, and the jury has rendered its verdict.

Judgment is entered in favor of Plaintiffs Producers Oil Company and Charles Goodall Revocable Trust and against the Defendant Hartford Fire Insurance Company in the amount of One Hundred Thousand Dollars and No/100 ($100.000.00).

The issues of whether Plaintiffs are entitled to an attorneys' fee and the amount of prejudgment interest, if any, to which Plaintiffs are entitled are specifically reserved by the Court for a later decision pursuant to the Agreed Pretrial Order herein.

DATED this 30th day of June, 1995.

S/ SVEN ERIK HOLMES

SVEN ERIK HOLMES
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

By: Brian S. Gaskill

G. Steven Stidham, OBA #8633
Brian S. Gaskill, OBA #3278
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Producers Oil Company and
Charles Goodall Revocable Trust

By: Gerald G. Stamper

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Angelyn L. Dale, Esq.
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Attorneys for Defendant,
Hartford Fire Insurance Company

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

API01-46

ALFA-PET, INC.,	)	
	)	
Plaintiff,	)	Civil Action
	)	No. 94-CV-882-H
v.	)	
	)	ENTERED ON DOCKET
VANDIVERE ENTERPRISES, INC. and JAMES VANDIVERE, an individual,	)	DATE JUL 0 3 1995
	)	
Defendants.	)	

FILED

JUN 30 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JOINT STIPULATION FOR DISMISSAL

Come now the plaintiff, Alfa-Pet, Inc., by and through its attorneys, and the defendants, Vandivere Enterprises, Inc. and James Vandivere, by and through James Vandivere, and having reached a mutually agreeable settlement of the underlying controversy, hereby enter into this Joint Stipulation for Dismissal, whereby they request that the Court dismiss plaintiff's complaint against defendants without prejudice, and retain jurisdiction over the parties and the subject matter for enforcement of the post-judgment remedies provided for in the Settlement Agreement.

Respectfully submitted,

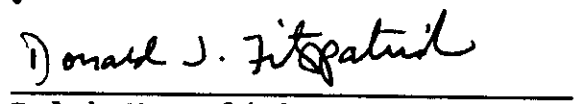
Vandivere Enterprises, Inc.

By: James Vandivere
Name: James Vandivere
Title: President

F:\ALFA\API01496.AL2

James Vandivere, personally

By: 
James Vandivere



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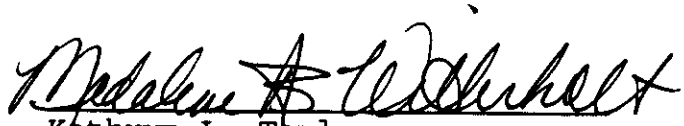

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(918) 592-9833

ATTORNEYS FOR PLAINTIFF

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DELVIN LEWIS RHODES,

Plaintiff,

vs.

TULSA COUNTY, sued as State of Oklahoma, Tulsa County Oklahoma, Officers of the State of Oklahoma, and ROBERT E. MARTIN,

Defendants.

No. 95-C-406-B

ORDER

This matter comes before the Court on Plaintiff's letter received on June 15, 1995, and motion to intervene and for immediate release ("In Re Order of 24th of May 1995, Thomas R. Brett, Chief Judge, United States District Court").

On May 24, 1995, the Court dismissed the above captioned civil rights action as frivolous under 28 U.S.C. § 1915(d). In footnote number 2, the Court stated that in the event Plaintiff intended to seek habeas corpus type relief, that request should be dismissed without prejudice to it being refiled as a pre-trial petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. (May 25, 1995 order at 4.) In his June 15 letter and motion, Plaintiff requests this Court to intervene in his state court's action for a writ of habeas corpus pursuant to 28 U.S.C. § 2241, filed on May 30, 1995, in Tulsa County District Court. He alleges that he has yet to receive any response from Judge Turnbull although more than ten working days have passed since the filing of his petition.

This Court cannot grant Petitioner release on the basis of an application filed in state court. Accordingly, Petitioner's motion to intervene and for immediate release ("In Re Order of 24th of May 1995, Thomas R. Brett, Chief Judge, United States District Court") is hereby **denied**. The Clerk shall **mail** to Plaintiff information and instructions for filing a pre-trial petition for a writ of habeas corpus and the necessary forms.

SO ORDERED THIS 30 day of June, 1995.

THOMAS R. BRETT, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ARCHIE MENDENHALL,

Plaintiff,

vs.

KOCH SERVICE, INC., a Corporation;

Defendant.

Case No. 92-C-290-B

ORDER OF DISMISSAL WITH PREJUDICE

NOW on this 30 day of June, 1995, this matter coming on before me the undersigned United States District Judge and having received the Joint Motion for Dismissal, finds as follows:

That each of the parties to this matter have entered into a settlement agreement which has been fully satisfied and is binding upon each of the parties to this action. Pursuant to the terms of the settlement agreement, this action is now herein **DISMISSED WITH PREJUDICE** and the Plaintiff shall be forever barred from pursuing this matter further against the Defendant. Each party shall bear its or his own attorneys' fees and costs incurred in this action.

S/ THOMAS R. BRETT

United States District Judge

APPROVED AS TO FORM AND CONTENT:

FRASIER & FRASIER

BY _____
Attorney for Plaintiff,
Archie E. Mendenhall

_____
Larry D. Leonard, Attorney for
Defendant, Koch Service, Inc.

_____
Rick E. Bailey, Attorney for
Defendant, Koch Service, Inc.

CERTIFICATE OF MAILING

This is to certify that on this 29th day of June, 1995, a true and correct copy of the above and foregoing instrument was mailed, postage pre-paid and properly addressed, to:

Steven R. Hickman
Frasier & Frasier
1700 Southwest Blvd.
Suite 100
P.O. Box 799
Tulsa, OK 74101

_____
Larry D. Leonard

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

MARY JANE ALEXANDER)
)
Plaintiff,)
)
vs.) Case No. 94-C-886-B
)
REGIS CORPORATION,)
)
Defendant.)

ORDER

UPON the joint stipulation of the Plaintiff, Mary Jane Alexander and the Defendant Regis Corporation, for the dismissal of the above captioned case with prejudice, and good cause having been shown,

IT IS ORDERED, ADJUDGED AND DECREED that the instant action is dismissed with prejudice, each side to bear her or its own costs, expenses and attorneys' fees.

DATED: 6-30-95

S/ THOMAS R. BRETT

United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

RICHARD R. RUSH,

Plaintiff,

v.

DONNA E. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES,

Defendant.

Case No. 94-C-153-E

FINDINGS AND RECOMMENDATIONS OF U. S. MAGISTRATE JUDGE

Plaintiff brought this action pursuant to 42 U.S.C. § 405(g) for judicial review of the final decision of the Secretary of Health and Human Services ("Secretary") denying plaintiff's application for disability insurance benefits under §§ 216(i) and 223 and supplemental security income under §§ 1602 and 1614(a)(3)(A) of the Social Security Act, as amended.

Plaintiff's most recent application was filed on February 6, 1991, and denied by the ALJ on July 31, 1992. The Appeals Counsel denied Plaintiff's request for review of the ALJ's decision on December 21, 1993.[1] Plaintiff had been granted a prior period of

[1]The Administrative Appeals Judge wrote:

> The Appeals Council has considered the medical reports which your attorney submitted from Parkside Community Psychiatric Services and Hospital concerning your hospitalization on April 8, 1993.
>
> Under the Social Security Act, applications for Title II (disability insurance benefits) filed after June 30, 1980 and for Title XVI (Supplemental Security Income) filed after April 30, 1986, are effective to establish disability only if the requirements are satisfied on or before the date the hearing decision was issued (20 CFR 404.976.(b) and 416.1476(b)). Since your applications were filed on February 6, 1991, they are subject to this restriction. In determining whether to grant a request for review on these claims, the Appeals Council will consider additional evidence only if it is new and material and concerns the period ending on or before July 31, 1992, when the Administrative Law Judge issued his decision.
>
> The medical reports that your attorney furnished concern medical treatment that was rendered between April 8, 1993 and April 14, 1993, which is some nine months after the Administrative Law Judge's decision.

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disability extending from January 1980 to March 1982. Thereafter, an application filed on August 20, 1984 was denied through the hearing level, and an application filed on March 2, 1988 was denied at the initial level, both without further appeal.

The only issue now before the court is whether there is substantial evidence in the record to support the final decision of the Secretary that plaintiff is not disabled within the meaning of the Social Security Act.[2]

In the case at bar, the ALJ made his decision at the fifth step of the sequential evaluation process.[3] He found that the claimant had the residual functional capacity to perform the physical exertion and nonexertional requirements of work, except for

---

The Administrative Appeals Judge also noted that the plaintiff could file a new application for Supplemental Security Income in order to receive a determination of disability after July 31, 1992, but that his insured status for disability insurance benefits expired on June 30, 1991.

The 1993 Parkside medical reports noted that plaintiff suffered from depression after a five year old child died from complications following spina bifida surgery, and had suicidal thoughts after his wife divorced him. The psychiatric condition that resulted from these incidents was a primary consideration of the ALJ in granting benefits as of January 16, 1980, the date of the report containing a mental evaluation by Dr. Holland. However, the record documents that plaintiff's mental state improved with the passage of time, and the initial period of disability was terminated. Plaintiff's mental condition was not a significant consideration with regard to his subsequent applications. See Dr. Koepke's report of September 29, 1994, where he states that Plaintiff "fails to evidence anything suggesting psychotic process or serious psychiatric illness of any kind."

The April 20, 1993 medical report from Parkside (TR 22) documents recent depression and suicidal ideation, but does not relate to the period on or before July 31, 1992, when the ALJ made his decision. The Appeals Council properly declined to consider the 1993 Parkside reports, pursuant to 20 CFR §§ 404.967(b) and 1476(b).

[2]Judicial review of the Secretary's determination is limited in scope by 42 U.S.C. § 405(g). The court's sole function is to determine whether the record as a whole contains substantial evidence to support the Secretary's decisions. The Secretary's findings stand if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citing Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197,.229 (1938)). In deciding whether the Secretary's findings are supported by substantial evidence, the court must consider the record as a whole. Hephner v. Mathews, 574 F.2d 359 (6th Cir. 1978).

[3]The Social Security Regulations require that a five-step sequential evaluation be made in considering a claim for benefits under the Social Security Act:

1. Is the claimant currently working?
2. If claimant is not working, does the claimant have a severe impairment?
3. If the claimant has a severe impairment, does it meet or equal an impairment listed in Appendix 1 of the Social Security Regulations? If so, disability is automatically found.
4. Does the impairment prevent the claimant from doing past relevant work?
5. Does claimant's impairment prevent him from doing any other relevant work available in the national economy?

20 C.F.R. § 404.1520 (1983). See generally, Talbot v. Heckler, 814 F.2d 1456 (10th Cir. 1987); Tillery v. Schweiker, 713 F.2d 601 (10th Cir. 1983).

lifting/carrying no more than 10 pounds, prolonged standing/walking, and the need to move around occasionally. He concluded that claimant was unable to perform his past relevant work as a convenience store clerk, youth counselor, woodworker, and apartment manager and that his residual functional capacity for the full range of sedentary work was reduced by the need to move around occasionally.

The ALJ concluded that claimant is 51 years old, which is defined as "closely approaching advanced age," but was a "younger person" at the alleged onset of his disability, has a 12th-grade education plus two years of college, and does not have any acquired work skills which are transferable to the skilled or semiskilled work functions of other work. Based on his exertional capacity for sedentary work and his age, education, and work experience, the ALJ found that the regulations directed a conclusion of "not disabled." The ALJ then concluded that, although the claimant's additional nonexertional limitations did not allow him to perform the full range of sedentary work, there were a significant number of jobs in the national economy which he could perform, such as order clerk, record clerk, and general office clerk. Having determined that claimant's impairments did not prevent him from performing jobs that exist in the national economy, the ALJ concluded that he was not disabled under the Social Security ACT at any time through the date of the decision.

Claimant now appeals this ruling and asserts alleged errors by the ALJ:

(1) That the ALJ's finding that claimant was not disabled by a cervical impairment is not supported by substantial evidence.

(2) That the ALJ failed to meet the burden of showing the availability of work

claimant could perform despite his limitations.

It is well settled that the claimant bears the burden of proving his disability that prevents him from engaging in any gainful work activity. Channel v. Heckler, 747 F.2d 517, 579 (10th Cir. 1984).

Claimant contends he has not engaged in work activity since February 15, 1988, largely because of back and neck problems. He met the disability insured status requirements through June 30, 1991. The medical evidence shows he has severe spina bifida, ankylosing spondylitis, complaints of pain, headaches, and periodic episodes of right eye iritis. He claims the most disabling problem is stiffness and pain in his neck, especially if he sits or stands too long, and resulting headaches (TR 95-96).

Dr. Richard G. Cooper examined claimant on March 28, 1988. He said "This is a 47-year-old white male who is heavily muscled. He stands erect. He can walk on his toes and can walk on his heels, but he comes in with a stick, walking slowly. He did not need to hold on to the furniture much when he was walking on his toes or walking on his heels. Posture is good when he stands up." The doctor went on to find:

> Range of motion of the cervical spine is restricted as follows: Right and left side bending 20 degrees. Flexion 15 degrees. Extension 15 degrees. Right rotation and left rotation 45 degrees each. In the thoracolumbar spine, right and left side bending 20 degrees. Flexion 30 degrees. Extension 10 degrees. The range of motion of the fingers, wrists, elbows, shoulders, hips, knees, and ankles are full range of motion. Circumference of the left calf 15-1/4 inches, right calf 15 inches. Left side 20-1/2 inches; right side 20-1/2 inches. He has several minor scratches and abrasions. I asked him about that, and he says he got that from clipping hedges yesterday. The Yeoman tests are negative. Strength of the quadriceps, hamstrings, abductors and abductors of the hips and toe dorsiflexors are full and equal on the two sides. The patient was able to walk on toes and walk on heels. Leg lengths are equal. Fabere tests are negative. In the seated straight leg raising tests, he leaned back and complained of pain. In the supine, straight leg raising test

> at 40-45 degrees, he complains of pain shooting into his low back and into his buttocks, specifically not into the thighs or the legs.When I asked that, he said, "Well I have had sciatica in the past." (emphasis added).

(TR 617). The doctor concluded that claimant had "some restricted range of motion of the cervical and thoracolumbar spines," but added "[i]t would be interesting to see on [sic] x-rays of his back" (TR 617-18).

By June 7, 1988, a doctor noted that claimant "feels better than ever - samples given worked well" (TR 591). Claimant was exercising and had no joint swelling or tenderness (TR 591). In June of 1989 a doctor noted claimant had injured his foot "playing basketball" (TR 625).[4] A myelogram done on November 1, 1989, was "unremarkable" (TR 629).

A year later, on November 5, 1990, claimant was examined by Dr. Richard F. Tenney because of "neck pain and limitation of motion" and the doctor concluded:

> On examination, cervical range of motion is as follows: Extension is 10 degrees, flexion is 30 degrees, right rotation is 20 degrees, left rotation is 20 degrees, right tilt is 10 degrees and left tilt is 5 degrees. No motor deficits are present in the upper extremities. Sensation is intact in the upper extremities and in both hands. Biceps reflex is 1+ right and 1+ left. Triceps reflex is 2+ right and 1+ left.
>
> . . . .
>
> I feel that this patient's symptoms are compatible with ankylosing spondylitis or at least severe cervical arthritis and I have suggested to him that he return to the Oklahoma University Medicine Clinic for further evaluation and for x-rays. I will give the patient samples of anti-inflammatory medication.

---

[4]The following explanatory testimony appears in the record (TR 107-108):

> Q I also noticed in the medical records , in June of '89, you went to the emergency room at St. John's. Exhibit C-42. Said you had a basketball injury. Or injury playing basketball. Can you tell us about that?
>
> A I was watching my, my high school boy and the three friends playing basketball at this friend's house. I was standing there with their dad, and the ball came by me. I wasn't playing. And I make a move to stop the ball with my foot, and there was a hole there. So I went -- knee collapsed. I went down. And the next day, I had a swollen foot -- or the next day or the day after that. And it was very painful. That's why I went to the hospital.

(TR 644).

Plaintiff was not told by Dr. Tenney to restrict activities. An x-ray the next day showed "some anterior osteophytic spurring at the C2-C3 level as well as at the C3-C4, C5-C6 and C6-C7 levels," but the intervertebral disk spaces appeared well maintained and there was no significant loss of vertebral body height (TR 719). The cervical spine was in good alignment with no fracture or dislocation identified, and the prevertebral soft tissues were within normal limits (TR 719). The changes were suggestive of "osteoarthritic involvement of the cervical spine" (TR 719).

On January 7, 1991, Dr. Tenney gave claimant a letter "for his use as he sees fit," discussing claimant's conditions as described to him and concluding: "It is my feeling that this patient is disabled with regards to performing any type of occupational activity" (TR 643). The doctor did not include any laboratory tests or discuss an examination of the claimant.

An x-ray was taken of claimant's dorsal spine and pelvis on January 22, 1991, and the doctor reported:

> There is a smooth dorsal kyphosis with no scoliosis. The vertebral bodies are well maintained without evidence of trauma. The intervertebral disk spaces are well maintained and the spine appears to be free of any evidence of arthritic changes . . . . Ankylosing arthritis of the sacroiliac joints and L4-L5 vertebral bodies and a comparison with previous film in 1984 reveals that the ankylosis of the left sacroiliac joint is now complete whereas in 1984 there was still some portion of the joint visible. The right sacroiliac joint also shows evidence of progression in that the lower portion of the right sacroiliac joint is now almost completely obliterated.

(TR 690).

However, on March 11, 1991, claimant's physician stated that there was no

information at his disposal that would support a claim for disability and he would not write a letter in support of such a claim (TR 579). The next month, on April 4, 1991, his doctor reported he was "doing great on Wellbutrin - no complaints" (TR 578). On June 21, 1991, Dr. Robert D. Grubb reported:

> The patient does not appear to have any joint deformity, redness, swelling, heat or tenderness. His grip strength seems weak but the dexterity of gross and fine manipulation is all right. He appears to have very good gait but not as good as one might expect from an individual of his age he seems more unsteady on his heel walking and toe walking the reason for this is not obvious. I do not believe assistive devices would help this patient (TR 677).

On September 16, 1991, claimant's physician commented that claimant continued to make "manipulative comments," such as "if I have to go through another winter like last one I won't be around any longer," and refused to make an effort to obtain Wellbutrin, which had helped in the past (TR 575).

On May 14, 1992, Dr. Raymond Sorensen reported that he examined claimant for chronic pain and found "muscle soreness and areas of spasm throughout the body" (TR 710). He concluded that claimant could work, but was

> limited in the degree and type of employment that he would be able to perform. He would be restricted in non-repetitive activity and also restricted in a job position that would not limit him to a sitting or standing position for any length of time. He would also be limited in an occupation that involves lifting more than five pounds.

(TR 711).

There is no merit to claimant's contention that the ALJ's finding that he was not disabled by a cervical impairment is not supported by substantial evidence. While Dr. Tenney concluded he was disabled with regards to performing any occupational activity, the doctor did not base this conclusion on any laboratory tests and only examined claimant

once (TR 46, 643). On the other hand, other doctors have refused to find him totally disabled and suggested he was exaggerating his disability (TR 575, 579, 677). Dr. Sorenson concluded that he was only limited in the type of employment he could perform (TR 711).

The ALJ correctly concluded that claimant's complaints were "disproportionate to the objective findings" (TR 43). The ALJ noted claimant only saw a doctor intermittently for neck pain (TR 44), he received relief with medication (TR 44, 578, 591) and had no side effects (TR 44), and he could clip hedges in March of 1988 (TR 617) and played basketball in 1989 (TR 45, 625). The ALJ noted that claimant's complaints of inability to afford medication and treatment were not credible, because he could afford to buy two packages of cigarettes a day and ordinary ways to reduce neck pain such as exercise or using a pillow behind the back or knees while sleeping, sitting, or driving were cost free (TR 45). The ALJ noted claimant testified he attends church frequently (TR 45, 106).

There is also no merit to claimant's contention that the ALJ failed to show the availability of work he could perform. Once the ALJ determined that plaintiff's residual functional capacity precluded him from returning to his past relevant work and that he could perform sedentary work with certain restrictions; he properly obtained vocational expert testimony, which is preferred by the courts when the hearing record does not contain information on the plaintiff's ability to perform work activities other than those connected with his former work. Decker v. Harris, 647 F.2d 291, 298 (8th Cir. 1981); Warner v. Califano, 623 F.2d 531, 532 (8th Cir. 1980).

The ALJ questioned the vocational expert as follows:

Q Now let me give you a hypothetical.

A Okay.

Q Let's assume that we have a male individual who is 51 years of age. Has 2 years of college. With the ability to read and write and use numbers. And can communicate well.

A Um-hum.

Q Let's assume further, that this individual in general has the physical capacity to perform sedentary work. Now would you describe sedentary work as set out in the Social Security Administration's definitions?

A Yes. It's sitting most of the time, but getting up and moving about occasionally. They [sic] most they have to lift is 10 pounds.

Q All right. That's a 10- pounds maximum?

A Yes.

Q Okay. Let's assume in this case that this individual has a symptomatology from a variety of sources. Including that of chronic pain, which -- the neck and the lower back. And it's of a sufficient severity as to be noticeable to him at all times. And that he finds it necessary to take medications for this symptomatology. And also he suffers from headaches that require medication.

But that with the medication he still can remain reasonably alert to perform functions presented by his work setting. Although he will find necessary to change positions from time to time to relieve the symptomatology of the chronic pain. Now, assuming these circumstances we're talking about sedentary work only.

A Okay.

Q Would this individual -- could he return to any of past relevant jobs?

A Let me review the past relevant jobs. Let me go through them. The -- I got the general idea from hearing his testimony, that the jobs were kind of what I would -- jobs which friends allowed him special privileges. The -- and I'll start out with the woodworking. It's a light job. Should be able to do that. I'm sorry, that's considered a light job. No.

Q All right.

A It's 10-pounds max. Scratch --

Q Let me carry it a step further.

A Okay.

Q Does this individual retain any skills which are transferrable to any jobs existing in this region of the country which he might be able to perform sedentary --

A Okay.

Q -- work?

A That, that I can.

Q All right.

A That's a little easier. Okay. I would say that there are a number of sedentary type administrative -- I mean, clerical --

(TR 113-115).

. . . .

Q All right. Now, do you have any other vocationally relevant factors that we want to consider? But I think prior to that, I will ask you another hypothetical question.

A All right.

Q Now, let's assume that the testimony of the claimant, as given here today, was found to be credible.

A Yes.

Q And substantially verified by the third-party medical evidence which is a part of the record. And without any significant contradictions. Would this individual be able to return to any of his past relevant work?

A If we keep him at a sedentary level, apartment manager is considered a light occupation, so he could not do that. I would say, no.

Q Well, I'm not saying sedentary. I'm saying to any of his past relevant work. In other words, I'm not putting sedentary or light. I'm putting based upon the medical evidence in the record. The testimony you've heard today.

A Um-hum.

Q And your answer is no?

A No. I don't think he could.

(TR 116-117).

It is true that "testimony elicited by hypothetical questions that do not relate with precision all of a claimant's impairments cannot constitute substantial evidence to support the Secretary's decision." Hargis v. Sullivan, 945 F.2d 1482, 1492 (10th Cir. 1991) (quoting Ekeland v. Bowen, 899 F.2d 719, 722 (8th Cir. 1990)). However, in forming a hypothetical to a vocational expert, the ALJ need only include impairments if the record contains substantial evidence to support their inclusion. Talley v. Sullivan, 908 F.2d 585, 588 (10th Cir. 1990). The ALJ did this, and the vocational expert determined there were sedentary jobs that existed in the national economy that claimant could perform.

The ALJ established that the vocational expert had been present for all of the testimony and studied the record. (TR 110-111). Claimant's representative at the hearing was only able to elicit favorable testimony from the vocational expert by asking the expert to assume impairments that the ALJ properly deemed unsubstantiated, including an inability to look down at a work surface and poor vision (TR 117-119). These opinions, based on unsubstantiated assumptions, were not binding on the ALJ. Gay v. Sullivan, 986 F.2d 1336, 1341 (10th Cir. 1993). It was proper for the ALJ to limit the hypothetical questions to those impairments which were actually supported in the record. Jordan v.

Heckler, 835 F.2d 1314, 1316 (10th Cir. 1987).

The decision of the ALJ is supported by substantial evidence and is a correct application of the regulations. The decision is affirmed.

Dated this 29th day of June, 1995.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

t:rush.fr

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

DAVID M. LUKE,

Plaintiff,

v.

DONNA E. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES,

Defendant.

Case No. 93-C-745-W

ORDER

Plaintiff brought this action pursuant to 42 U.S.C. § 405(g) for judicial review of the final decision of the Secretary of Health and Human Services ("Secretary") denying plaintiff's application for disability insurance benefits under §§ 216(i) and 223 and supplemental security income under §§ 1602 and 1614(a)(3)(A) of the Social Security Act, as amended.

The procedural background of this matter was summarized adequately by the parties in their briefs and in the decision of the Administrative Law Judge ("ALJ"), which summaries are incorporated herein by reference.

The only issue now before the court is whether there is substantial evidence in the record to support the final decision of the Secretary that plaintiff is not disabled within the meaning of the Social Security Act.[1]

In the case at bar, the ALJ made his decision at the fifth step of the sequential

[1] Judicial review of the Secretary's determination is limited in scope by 42 U.S.C. § 405(g). The court's sole function is to determine whether the record as a whole contains substantial evidence to support the Secretary's decisions. The Secretary's findings stand if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citing Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)). In deciding whether the Secretary's findings are supported by substantial evidence, the court must consider the record as a whole. Hephner v. Mathews, 574 F.2d 359 (6th Cir. 1978).

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evaluation process.[2] He found that claimant had the residual functional capacity to perform the physical exertion requirements of work, except for those aspects of work over and above those set forth for medium exertional activity and further restricted by the requirement that claimant's work activity be restricted to low stress jobs.

The ALJ concluded that claimant was unable to perform his past relevant work as a cook, a shipping clerk, a spray painter, a factory worker, and a roustabout and that his residual functional capacity for the full range of medium work was reduced by the necessity to work in a low stress environment. He noted that claimant was 50 years old, which is defined as closely approaching advanced age, had a 9th-grade education, which is defined as limited, and vocational training as an auto mechanic, and did not have any acquired work skills which are transferable to the skilled or semiskilled work activities of other work.

Although the claimant' exertional limitations did not allow him to perform the full range of medium work, the ALJ found that there were a significant number of jobs in the national economy which he could perform, such as short order cook, food counter service, food preparation worker, and assembly. Having determined that claimant's impairments did not prevent him from working, the ALJ concluded that he was not disabled under the

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[2] The Social Security Regulations require that a five-step sequential evaluation be made in considering a claim for benefits under the Social Security Act:

1. Is the claimant currently working?
2. If claimant is not working, does the claimant have a severe impairment?
3. If the claimant has a severe impairment, does it meet or equal an impairment listed in Appendix 1 of the Social Security Regulations? If so, disability is automatically found.
4. Does the impairment prevent the claimant from doing past relevant work?
5. Does claimant's impairment prevent him from doing any other relevant work available in the national economy?

20 C.F.R. § 404.1520 (1983). See generally, Talbot v. Heckler, 814 F.2d 1456 (10th Cir. 1987); Tillery v. Schweiker, 713 F.2d 601 (10th Cir. 1983).

Social Security Act at any time through the date of the decision.

Claimant now appeals this ruling and asserts alleged errors by the ALJ:

(1) That the ALJ erred in ignoring the treating physician rule.

(2) That the ALJ erred in failing to find that plaintiff's condition met the listing of impairments.

(3) That the ALJ erred in failing to have a medical advisor present at claimant's hearing.

(4) That the ALJ misapplied the medical vocational guidelines.

(5) That the ALJ posed an improper hypothetical to the vocational expert.

It is well settled that the claimant bears the burden of proving his disability that prevents him from engaging in any gainful work activity. Channel v. Heckler, 747 F.2d 577, 579 (10th Cir. 1984).

Claimant has been treated for depression, alcohol dependency, and an anti-social personality disorder for several years. The ALJ found that his testimony was credible only to the extent that it was reconciled with his ability to perform medium work, performed at a low stress occupation (TR 26).

On December 18, 1990, Anita Fernandez-Low stated that claimant was making "good progress in therapy," but appeared to "have difficulty maintaining a full-time position on his own." (TR 224).

On December 26, 1990, Dr. Rebecca Dalisay completed a mental residual functional capacity assessment, finding claimant only moderately impaired, and concluding as follows: "ADL's are not significantly limited. He can understand and follow simple instructions. There is no evidence of brain damage due to alcohol. Currently he works as a cook at the

Salvation Army. He is capable of unskilled work." (TR 183-185, 202). Dr. Dalisay found claimant had severe impairments which did not meet the Listings, including an affective disorder, personality disorder, and a substance addiction (TR 195).

A month later, on January 22, 1991, Dr. Michael Charney did a similar assessment and concluded that claimant had some exertional limitations and medium work was appropriate for him (TR 188). Dr. Charney also concluded claimant should avoid respiratory irritants, like fumes (TR 191).

On March 14, 1991, Ms. Fernandez-Low, a "social work intern," wrote that she was seeing claimant weekly and he was making "substantial progress in fighting debilitating depressive symptoms" through therapy and medication, but continued to have anxiety and dysphoria and thus "it would be detrimental to his progress" to attempt to work, as it would increase his stress level (TR 212). She said he needed to stabilize his mood swings before becoming employed (TR 212).

On April 10, 1991, Ms. Fernandez-Low, now a "mental health therapist," wrote after treating claimant for seven months for depression and mood swings that:

> He has been compliant with his medications and has reported a more stabilized mood since he began using Lithium in December . . . attended individual therapy sessions regularly . . . [and] has benefitted from these and has followed through with interventions.
>
> Mr. Luke is able to cope with minimal stressors. He is currently working on a volunteer basis at St. Mary's as a cook two days a week. The responsibilities and personal interaction in a fulltime position could prove detrimental to Mr. Luke's progress at this time. He is living on his own for the first time in his life.

(TR 211).

On May 6, 1991, Dr. C. Craig Nelson completed a mental residual functional

capacity assessment, finding claimant only moderately impaired (TR 159-160) and concluding "personality disorder - borderline . . . some depression, does well with structure and support. Retains ability to perform S.G.A." (TR 161). Dr. Nelson concluded claimant has an affective disorder, personality disorder, and substance addiction disorder, but the impairments were not severe enough to meet the Listings (TR 171). Dr. Nelson concluded "[h]e has worked and currently volunteers work effort. He needs ongoing treatment, support, and encouragement but has the capacity for work." (TR 172). Dr. Eugene Chapman reported on the same date that claimant had only moderate exertional limitations relating to lifting and carrying weight and should avoid pulmonary irritants (TR 164, 167).

On March 10, 1992, Maria Newton, a "client advocate" at Parkside Psychiatric Hospital ("Parkside") reported that claimant was given Desyrel and Sinequan for back pain and counseled by the outreach clinic on his living situation. No formal diagnosis of his mental status was made when he was discharged, but he reported "no back pain, improved sleep and decreased anxiety" when he changed to Sinequan. (TR 256).

On July 6, 1992, Lynn Clark, a "client advocate" at Parkside did a psychiatric evaluation and found claimant "alert, cooperative, coherent and oriented . . . [with] an appropriate affect, good eye contact, and normal voice tone . . . negative for hallucinations and delusions . . . positive for suicidal/homicidal thoughts and depression." (TR 292). He was found to have depression, alcohol dependence, transsexualism, and an anti-social personality disorder (TR 293). He was given Trazodone and inpatient counseling (TR 293-296).

Dr. Thomas A. Goodman, a psychologist, examined claimant on September 23, 1992.

He did not review any medical records, but relied on claimant's comments to determine his condition (TR 259). The doctor reported:

> He looked somewhat dysphoric during the interview, although he did not look significantly depressed or elated. His psychomotor activity was in the normal range. His affect was normal. His speech was logical and appropriate. He gave no indications of hallucinations, delusions, or suicidal tendencies.
>
> His sensorium was clear and he was oriented to time, place and person. He can immediately repeat three separate objects and he can recall all of them after two minutes. He spelled world backwards correctly and named three of the last four presidents. He also quickly and accurately computed the number of nickels in $1.35.

(TR 260).

Dr. Goodman concluded as follows:

> Claimant gives a long history of psychological and particularly behaviorally and personality turmoil and pathology. It sounds as if he was reared in a dysfunctional family and early developed a conduct disorder together with severe alcoholism and what would appear to be possible sexual disorder of the transvestic type. Additionally, he has been involved in ongoing antisocial activities and has spent at least 10 years of his adult life in prisons. He has not had any definitive or extended type of psychiatric care, and particularly has not had any effective chemical dependency rehabilitation. Recently he has been applying for social security disability and in this context has applied for care of the Parkside Mental Health Clinic. I do not have the records and it is unclear exactly what they are treating him for and what their working diagnosis is at the present time. He says he is taking a combination of trazodone, an antidepressant, and lithium. He also says that he has been diagnosed as having a bipolar disorder, although this is very difficult to confirm with the history that I obtained today. I would certainly recommend that he remain in psychiatric care and particularly continue in alcohol dependency rehabilitation.
>
> My diagnoses at the present time are Axis I (1) Transvestic fetishism, by history. (2) Depressive disorder, NOS, by history. Axis II (1) Personality disorder, NOS, cluster B variety with antisocial and borderline features.
>
> Claimant psychologically has apparently been able to continue at his work until the present time. He has worked principally as a cook. As long as he

> remains sober and out of legal difficulties I see no reason why he could not continue the same type of work activities. However, in view of his recently stated diagnoses plus his recent treatment, it might be well to allow him a period of psychological treatment with a re-evaluation in a period of 6 to 12 months. At the present time, I see no reason why he is not capable of managing his own funds.

(TR 261).

On November 16, 1992, Sandra Crittenden, an outpatient therapist at Parkside, reported that claimant had been counseled there since July 6, 1992, and had been transferred to the outpatient clinic in September after "stabilization with medication and stable housing." (TR 271). He was found to have "instability of mood, interpersonal relationships, and self-image since adolescence." (TR 271). She also concluded he met the criteria for "Borderline Personality Disorder - 301.83.". (TR 271). She stated that he showed symptoms of depression and manic symptoms which markedly restricted his daily living activities and was frequently fired from jobs or quit (TR 272). She concluded he was "capable of securing employment," but "unable to maintain employment." (TR 272).

There is no merit to claimant's contention that the ALJ erred in ignoring the treating physician rule. Under that rule, an ALJ must give substantial weight to the statement of claimant's treating physician. Turner v. Heckler, 754 F.2d 326, 329 (10th Cir. 1985). If the physician's opinion is brief, conclusory, and unsupported by medical evidence, it may be rejected. Allison v. Heckler, 711 F.2d 145, 148 (10th Cir. 1983). "It is an accepted principle that the opinion of a treating physician is not binding if it is contradicted by substantial evidence." Mongeur v. Heckler, 722 F.2d 1033, 1039 (2nd Cir. 1983).

The "treating physicians" referred to in claimant's brief are Ms. Fernandez-Low and Ms. Crittenden, both therapists, not physicians. The ALJ noted this when he properly

concluded as follows:

> There is wide disparity between Dr. Goodman's opinion and those of Ms. Crittenden and Ms. Fernandez-Low. The Administrative Law Judge prefers to rely upon the medical opinion of Dr. Goodman. Dr. Goodman is a medical doctor. He is a licensed psychiatrist and neurologist. He specializes in psychiatry and legal medicine. Ms. Crittenden is a master's level social worker. Lynn Clark is a bachelor's level client advocate. There is no indication as to the educational level of Ms. Fernandez-Low. However, it is safe to assume that she is not a doctor. Her report is countersigned by a M.D., as is the reports of Ms. Clark and Ms. Crittenden. The Administrative Law Judge notes, after a review of the accompanying treatment notes in each of these specific exhibits, that the doctors were not treating physicians. Rather they merely performed the clerical functions of signing off on the non-medical trained opinions that were expressed by Ms. Clark, Ms. Crittenden, and Ms. Fernandez-Low.
>
> Dr. Goodman, as a trained psychiatrist, is by training and education better qualified to make insightful observations and come to informed judgements than are the bachelor and master levels social workers. Dr. Goodman found no indication of manic symptomatology in claimant. Claimant did not present observable pressure of speech or flight of ideas in his interview with Dr. Goodman. Claimant denied having a sleep disturbance since he had been on his Lithium. There is no objective indication that claimant suffers from a appetite disturbance or from a change in weight. Claimant has not exhibited a loss of interest in almost all activities. Claimant is actively seeking to obtain employment . . . .

(TR 18).

There is also no merit to claimant's contention that the ALJ erred in failing to find that claimant's condition met the Listings of Impairments. The ALJ specifically discussed Listings 12.04, 12.08, and 12.09, relating to affective disorders, personality disorders, and substance addition (TR 13-15). He then applied Dr. Goodman's findings, noting he was a trained psychiatrist (TR 16-18), and discussed claimant's daily activities:

> Claimant has moved out on his own and is now independent in living. Claimant has a driver's license, but does not have a car. Claimant walks and takes the bus to where ever he wants to go. Claimant watches television. Claimant attends Alcoholic Anonymous (AA) meetings almost every night.

> Claimant chairs the meeting one time a week. There are usually approximately 50 people at the meeting. While claimant alleges he has some difficulties with sleeping, he told Dr. Goodman, this has been alleviated with the Lithium.

(TR 19). There was substantial evidence to support the ALJ's conclusion that claimant did not meet the Listings. He analyzed claimant's mental disorder in great detail, discussing four areas, activities of daily living, social functioning, concentration, persistence, and pace, and deterioration in work or work-like settings. (TR 19-21).

There is no merit to claimant's contention that a medical advisor was required to be present at the hearing. Claimant cites Andrade v. Secretary of Health & Human Servs., 985 F.2d 1045, 1049 (10th Cir. 1993), in support of this contention. However, the court in Andrade did not make this requirement, but stated instead: "when the record contains evidence of a mental impairment, the Secretary cannot determine that the claimant is not under a disability without first making every reasonable effort to ensure that a qualified psychiatrist or psychologist has completed the medical portion of the case review and any applicable residual functional capacity assessment." The ALJ properly relied upon the residual functional capacity assessment completed by Dr. Goodman, a qualified psychologist.

There is also no merit to claimant's contention that the ALJ misapplied the medical-vocational guidelines ("grids"). "Where exertional limitations prevent the claimant from doing the full range of work specified in his assigned residual functional capacity, or where nonexertional impairments are also present, the grids alone cannot be used to determine the claimant's ability to perform alternative work." Campbell v. Bowen, 822 F.2d 1518, 1523 n.2 (10th Cir. 1987) (citing Talbot, 814 F.2d at 1460). If the claimant has both

exertional and nonexertional impairments, the ALJ must use the grids first to determine if the claimant is disabled by reason of the exertional impairment alone. Frey v. Bowen, 816 F.2d 508, 513 (10th Cir. 1987).

"If the claimant is not so disabled, the ALJ must then make a second individualized determination using the grids only as 'a framework for consideration of how much the individual's work capability is further diminished in terms of any types of jobs that would be contraindicated by the nonexertional limitations.'" Id. (citing Teter v. Heckler, 775 F.2d 1104, 1105 (10th Cir. 1985).

In this case, the ALJ properly found that claimant was not disabled by his nonexertional mental impairments and then used the grids only as a framework to consider how much his work capability was further diminished in terms of jobs that would be contraindicated, relying on the testimony of a vocational expert (TR 24-26).

Finally, there is no merit to claimant's contention that the ALJ posed an improper hypothetical to the vocational expert. It is true that "testimony elicited by hypothetical questions that do not relate with precision all of a claimant's impairments cannot constitute substantial evidence to support the Secretary's decision." Hargis v. Sullivan, 945 F.2d 1482, 1492 (10th Cir. 1991) (quoting Ekeland v. Bowen, 899 F.2d 719, 722 (8th Cir. 1990)). However, in forming a hypothetical to a vocational expert, the ALJ need only include impairments if the record contains substantial evidence to support their inclusion. Talley v. Sullivan, 908 F.2d 585, 588 (10th Cir. 1990). The ALJ did this, and the vocational expert determined there were jobs that existed in the national economy that claimant could perform (TR 72-76).

The ALJ established that the vocational expert had been present for all of the testimony and studied the record (TR 71). Claimant's representative at the hearing was only able to elicit favorable testimony from the vocational expert by asking the expert to assume impairments that the ALJ properly deemed unsubstantiated, including irrationality and the need to nap in the daytime (TR 77-81). These opinions, based on unsubstantiated assumptions, were not binding on the ALJ. Gay v. Sullivan, 986 F.2d 1336, 1341 (10th Cir. 1993). It was proper for the ALJ to limit the hypothetical questions to those impairments which were actually supported in the record. Jordan v. Heckler, 835 F.2d 1314, 1316 (10th Cir. 1987).

The decision of the ALJ is supported by substantial evidence and is a correct application of the regulations. IT IS AFFIRMED.

Plaintiff's Motion to Set Cause for Hearing (Docket #16) is moot.

Dated this 29th day of June, 1995.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

T:Luke.rr

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

TEDDY L. TOWNSEND,

Plaintiff,

v.

DONNA E. SHALALA,
SECRETARY OF HEALTH AND
HUMAN SERVICES,

Defendant.

Case No: 93-C-952-W

JUDGMENT

Judgment is entered in favor of the Secretary of Health and Human Services in accordance with this court's Order filed June 29, 1995.

Dated this 29th day of June, 1995.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

TEDDY L. TOWNSEND,

Plaintiff,

v.

DONNA E. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES,

Defendant.

Case No. 93-C-952-E

ORDER

Plaintiff brought this action pursuant to 42 U.S.C. § 405(g) for judicial review of the final decision of the Secretary of Health and Human Services ("Secretary") denying plaintiff's application for disability insurance benefits under §§ 216(i) and 223 of the Social Security Act, as amended.

The procedural background of this matter was summarized adequately by the parties in their briefs and in the decision of the Administrative Law Judge, which summaries are incorporated herein by reference.

The only issue now before the court is whether there is substantial evidence in the record to support the final decision of the Secretary that plaintiff is not disabled within the meaning of the Social Security Act.[1]

In the case at bar, the ALJ made his decision at the fourth step of the sequential

[1] Judicial review of the Secretary's determination is limited in scope by 42 U.S.C. § 405(g). The court's sole function is to determine whether the record as a whole contains substantial evidence to support the Secretary's decisions. The Secretary's findings stand if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citing Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)). In deciding whether the Secretary's findings are supported by substantial evidence, the court must consider the record as a whole. Hephner v. Mathews, 574 F.2d 359 (6th Cir. 1978).

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evaluation process.[2] He found that claimant has the residual functional capacity to perform work related activities, except for work involving sitting more than 4 hours, walking more than 2 hours, standing more than 2 hours, and lifting more than 35 pounds frequently and 50 pounds occasionally. He determined that claimant's past relevant work as a heating and air-conditioning journeyman, maintenance mechanic, truck driver, or cab driver did not require the performance of work-related activities precluded by the above limitations and therefore his impairments did not prevent him from performing his past relevant work. Having found that claimant was not under a "disability" as defined in the Social Security Act, the ALJ concluded that claimant was not disabled at any time through the date of the decision.

Claimant now appeals this ruling and asserts alleged errors by the ALJ:

(1) The ALJ erred in finding that claimant's past work as a heating and air conditioning journeyman was past relevant work, because it was not performed within 15 years of the ALJ's decision.

(2) The ALJ's step four evaluation was not in accordance with social security regulations and he should have reached the fifth step.

(3) The ALJ erred in finding that claimant could perform his past work, because it involved heavy exertional requirements and

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[2] The Social Security Regulations require that a five-step sequential evaluation be made in considering a claim for benefits under the Social Security Act:

1. Is the claimant currently working?
2. If claimant is not working, does the claimant have a severe impairment?
3. If the claimant has a severe impairment, does it meet or equal an impairment listed in Appendix 1 of the Social Security Regulations? If so, disability is automatically found.
4. Does the impairment prevent the claimant from doing past relevant work?
5. Does claimant's impairment prevent him from doing any other relevant work available in the national economy?

20 C.F.R. § 404.1520 (1983). See generally, Talbot v. Heckler, 814 F.2d 1456 (10th Cir. 1987); Tillery v. Schweiker, 713 F.2d 601 (10th Cir. 1983).

the ALJ restricted him to medium work.

It is well settled that the claimant bears the burden of proving his disability that prevents him from engaging in any gainful work activity. Channel v. Heckler, 747 F.2d 577, 579 (10th Cir. 1984).

The medical evidence establishes that the claimant has had severe low back pain and chest pain. He claims he became disabled on January 5, 1989, and he was last insured under the disability insured status requirements of the Social Security Act on March 31, 1991. The ALJ properly limited his opinion to the period between these dates. (TR 13).

Claimant strained his back moving equipment in December of 1977 (TR 294-303) and was treated with physical therapy and medications (TR 305-318). X-rays showed no evidence of pathologic process of the spine (TR 318) and a myelogram was unremarkable, with no evidence of a herniated disc but just "minimal extradural defects in the cervical region from spondylosis" (TR 344). X-rays of his chest showed no abnormality (TR 349). An electromyography report showed an abnormal condition with "spontaneous fibrillations indicating denervation of the anterior tibial muscle" (TR 353).

In April of 1978, his back pain was found to be "decreasing in severity" (TR 357). He complained of severe back pain in September of 1978 and was placed in traction and given physical therapy (TR 369-375). He gradually improved and x-rays showed no acute injury (TR 369). In July of 1987, he was seen for low back pain and physical therapy was done (TR 420).

In September of 1989, he was admitted to the hospital with complaints of chest pain, which was relieved with one Nitroglycerin (TR 425). He was discharged in two days

with plans to do a ETT and medication, but an EKG showed no problems (TR 425-26). In March of 1992, he reported "constant back and neck pain," but medical records from July 25, 1991 through February 21, 1992 do not mention such pain (TR 388-395).

No doctor has ever found that claimant's back or chest pain precludes him from working. Their medical findings are completely at odds with his subjective complaints and claims that he can't stand more than 10-15 minutes, sit more than 30 minutes at a time, walk more than 400 feet, or lift more than 5 pounds (TR 41-43).

A medical expert, Dr. Harold Goldman, noted that claimant had a long history of alcohol abuse, which has caused gastritis (TR 30). He noted that, while claimant had a history of back pain, in 1992 a neuroexamination was done and showed no atrophy, normal deep tendon reflexes, no motor deficits, and only a sensory decrease of the right thigh (TR 31). He also noted that claimant has had chest pain, but an MRI was normal and there was no evidence of cardiac disease (TR 32). He concluded that claimant could sit, stand, and walk for eight hours a day and had no restrictions on his ability to sit for four hours, walk for two hours, and stand for four hours (TR 33). He found that claimant could lift 35 pounds frequently and 50 pounds occasionally and stoop, bend, crawl, and climb (TR 33). He could also grasp and reach and do fine manipulation (TR 34). The expert disputed claimant's testimony that he could only stand for ten minutes at a time for three hours out of an eight hour day, sit for thirty minutes at a time three hours a day, and only lift ten pounds (TR 35).

There is no merit to claimant's contention that his work as a heating and air conditioning journeyman is not past relevant work under 20 C.F.R. § 404.1565(a) because

it was done more than fifteen years ago.[3] The relevant period of time in this case is between January 5, 1989, plaintiff's alleged disability onset date, and March 31, 1991, the last day he met the insured status requirements for his claim (TR 13). Plaintiff stated that he last worked as a journeyman in December 1977 (TR 77). Therefore the fifteen-year period would not end until December 1992, well after the period of time under review by the ALJ.

There is also no merit to plaintiff's assertion that the ALJ's step four evaluation was not proper, as he did not make specific findings as to claimant's residual functional capacity, the demands of his past work, and a comparison of the job requirements and claimant's limitations. The ALJ questioned the vocational expert about the nature and extent of exertion required in claimant's past jobs:

Q And you heard the testimony of the claimant and the medical

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[3]Title 20 CFR § 404.1565(a) provides:

> § 404.1565 Your work experience as a vocational factor.
>
> (a) General. Work experience means skills and abilities you have acquired through work you have done which show the type of work you may be expected to do. Work you have already been able to do shows the kind of work that you may be expected to do. We consider that your work experience applies when it was done within the last 15 years, lasted long enough for you to learn to do it, and was substantial gainful activity. We do not usually consider that work you did 15 years or more before the time we are deciding whether you are disabled (or when the disability insured status requirement was last met, if earlier) applies. A gradual change occurs in most jobs so that after 15 years it is no longer realistic to expect that skills and abilities acquired in a job done then continue to apply. The 15-year guide is intended to insure that remote work experience is not currently applied. If you have no work experience or worked only "off-and-on" or for brief periods of time during the 15-year period, we generally consider that these do not apply. If you have acquired skills through your past work, we consider you to have these work skills unless you cannot use them in other skilled or semi-skilled work that you can now do. If you cannot use your skills in other skilled or semi-skilled work, we will consider your work background the same as unskilled. However, even if you have no work experience, we may consider that you are able to do unskilled work because it requires little or no judgment and can be learned in a short period of time.

expert today?

A Yes, sir.

Q Please describe the claimant's past work history and his skill and exertional level.

A Yes, sir. When he's functioning as a laborer in the steel plant, the 1991 Dictionary of Occupational Titles classifies this as very heavy work with an SVP of 2 which is unskilled. He was functioning as a journeyman and a heating and air conditioning person for a number of years which is classified as medium work with an SVP of 7 which is skilled. He was also a millwright for approximately four years, which is classified as heavy with an SVP of 7, which is skilled. He was a maintenance mechanic person for approximately four years, which is classified as medium work with an SVP of 7, which is skilled. The truck driver, which is classified as medium work with an SVP of 4. He also drove a cab, which is classified as medium with an SVP of 3, which is semi-skilled.

Q A hypothetical question, this (INAUDIBLE) individual who is say 46 to 47 years of age -- going back to the date last insured of March '91 -- male, has completed the 10th grade I believe it is plus a GED and has the ability to read, write and use numbers. He has the past relevant [sic] that we talked about. Let's assume for the first hypothetical that we use Dr. Goldman's restrictions dated today and those would be, he would be limited to walking two hours at a time, standing/sitting for four of each at a time, all those he'd be doing together for a total of eight hours a day. Lifting would be limited to due to painful back pain to 35 pounds frequently, 50 pounds occasionally and no limitations as far as using his hands or feet and there would be no limitations as far as postural movements and no (INAUDIBLE) restrictions. With those restrictions, would there be any jobs in the regional or national economy (INAUDIBLE)?

A Yes, sir, there are.

Q What would those be?

A He could function as a journeyman in heating and air conditioning. He can utilize his skills as a --

Q That's from the past relevant work you mean?

A Yes, sir. Also function as a mechanic or a maintenance person or mechanical inspector or adjuster, all utilization of transferable job skills.

Q That second job you just mentioned, is that the same job he held or --

A Yes, sir.

Q Say the job again (INAUDIBLE) --

A The maintenance and mechanical. He could function as a -- based upon the hypothetical as a truck driver or a taxi driver.

Q Is this the past relevant work?

A Yes, sir. (TR 55-56).

The ALJ was not required to make his "own analysis" at step four. He properly relied on the evaluation of the vocational expert, that claimant's past jobs were generally medium work, and the medical expert's conclusion, that claimant was not disabled by any back or chest pain, to conclude claimant could perform his past relevant work. He specifically found that plaintiff could sit 4 hours, walk 2 hours, stand 2 hours, lift 35 pounds frequently and lift 50 pounds occasionally and that the vocational expert testified that plaintiff could perform his past work based on these abilities and restrictions (TR 17, 55-56).

It has been recognized that "some claimants exaggerate symptoms for purposes of obtaining government benefits, and deference to the fact-finder's assessment of credibility is the general rule." Frey v. Bowen, 816 F.2d 508, 517 (10th Cir. 1987).

Finally, there is no merit to claimant's contention that he could not perform his past

work because it involved lifting 50-100 pounds and the ALJ concluded he could only do medium work. Claimant argues that a finding of not disabled may only be made at step four if a claimant is found capable of performing his past work as he actually performed that job. However, a claimant may be found not disabled at the fourth step if he can perform either his actual past job or his past type of job. 20 C.F.R. § 416.920(e); Jozefowicz v. Heckler, 811 F.2d 1352, 1356 (10th Cir. 1987); Tillery, 713 F.2d at 607. Since the vocational expert testified that plaintiff's past type of jobs could be performed based on the abilities and restrictions he was actually found to have by the medical expert, his claim was properly denied at the fourth step in the sequential evaluation process. Neither the vocational expert nor the ALJ classified claimant's past relevant work according to the least demanding function of the claimant's past occupations, "as this would be contrary to the letter and spirit of the Social Security Act." Valencia v. Heckler, 751 F.2d 1082, 1086 (9th Cir. 1985).

The ALJ's decision is supported by substantial evidence and is in accordance with the relevant social security regulations and law. The ALJ's decision is AFFIRMED.

Dated this 29th day of June, 1995.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S:Townsend